

No. 48526-5-II

Court of Appeals, Div. II,
of the State of Washington

State of Washington,

Respondent,

v.

Brian Christopher Cozad,

Appellant.

Brief of Appellant

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1. Introduction

Brian Cozad was a transient sex offender, required to register under RCW 9A.44.130. In April 2014, Cozad was faced with an impossible choice: either give up his sole source of income or commit the crime of failure to register by failing to report to the sheriff's office in-person each Tuesday. Cozad chose the latter, though he made sure to call in each week and leave a detailed message informing the sheriff's office where he had been each day.

As a result of this choice, Cozad has been convicted for failure to register. However, the trial court refused to instruct the jury on the affirmative defense of necessity, which is available when the pressure of events causes the defendant to act unlawfully in order to avoid a harm more serious than the harm resulting from violating the law. Had Cozad complied with the technical requirement of in-person check-in at the sheriff's office, he would have lost his job and likely become permanently homeless. The only harm from Cozad's failure to report in person was a slight delay in the sheriff's office receiving the statutorily required information that Cozad provided in his voice messages. Cozad was entitled to have the jury instructed on the necessity defense. This Court should reverse and remand for a new trial.

2. Assignments of Error

Assignments of Error

1. The trial court erred in amending jury instruction 13 to include alternative registration requirements relating to an offender with a fixed residence.
2. The trial court erred in refusing to instruct the jury on the common law defense of necessity.
3. The trial court abused its discretion in excluding testimony that could have been relevant to the necessity defense.
4. Cozad's defense counsel provided ineffective assistance.

Issues Pertaining to Assignments of Error

1. The requirements for registering as a sex offender under RCW 9A.44.130 vary depending on whether the offender has a "fixed residence." The undisputed evidence elicited at trial shows that Cozad lacked a "fixed residence" under the statutory definition. Did the trial court err in instructing the jury on alternative registration requirements relating to an offender with a "fixed residence"? (assignments of error #1 and 4)
2. The common law defense of necessity is available when the pressure of events causes the defendant to act unlawfully in order to avoid a harm more serious than the harm resulting from violating the law. Cozad presented evidence that he did not check-in in-person each week in order to avoid the greater harm of him becoming unemployed and permanently homeless. Did the trial court err in refusing to instruct the jury on the necessity defense? (assignments of error #2, 3, and 4)

3. Statement of the Case

Brian Cozad was released from prison on November 18, 2013. RP 140. He met with his probation officer in Clark County, then registered as a transient sex offender with the county sheriff's office. RP 60-61, 140-41. In January 2014, Cozad moved in with his cousin and roommates. RP 141-42. He registered again with his new address as a fixed residence. *See* RP 141.

Cozad was not on the lease for the apartment, and in April 2014, the apartment manager asked Cozad to leave the premises. RP 143. On April 18, Cozad registered with the county sheriff's office as homeless. RP 142. Cozad would sometimes come back to the apartment to sleep when the apartment manager was not present. RP 147-48.

On Monday, April 21, Cozad started a new job with Georgia Pacific, through Labor Works. RP 143-44, 145-46. He reported to Labor Works at 5:00am each morning and did not return until 7:30 or 8:00pm each night. RP 144. Phones were prohibited at the work site. RP 146, 148-49.

The sheriff's office required transient sex offenders to check-in in person at the office every Tuesday during regular business hours. RP 84-85, 90. At each Tuesday check-in, offenders would fill out a form listing where the offender stayed each of the preceding seven days. RP 85-86.

Cozad did not check-in in person on April 22, April 29, or May 6. RP 95. However, he had been told by the sheriff's office sex offender registration unit that if there was ever a problem checking in he should call their number and if they weren't there to leave a detailed message. RP 146. On these Tuesdays, when Cozad returned from work, he called the sex offender registration unit and left detailed messages letting them know where he had been staying for the preceding seven days, whether it was in his truck, at the apartment, or in a hotel. RP 146, 148, 150.

Cozad was arrested and charged with failure to register as a sex offender with two or more prior convictions. *See* CP 18. The Second Amended Information alleged that he knowingly failed to comply with registration requirements between April 18, 2014, and May 28, 2014. CP 18.

At trial, the State presented evidence that Cozad knew the registration requirements, including the requirement that he check-in in person on April 22. *E.g.*, RP 92-94. The State also presented evidence of Cozad's prior convictions for sex offenses, including three prior convictions for failure to register, in 2002, 2008, and 2011. RP 123-38, 160-61. The court provided a limiting instruction on the prior conviction evidence. CP 30.

The State requested the jury be instructed on registration requirements for an offender with a fixed residence. RP 169.

Cozad had testified that his registration as homeless on April 18 was “not quite accurate” because he often returned secretly to the apartment to sleep. RP 142, 147-48. The trial court granted the request, amending jury instruction 13. *See* CP 38; RP 169.

Cozad sought an instruction on the defense of necessity, WPIC 18.02. *See* RP 167, CP 47-49. Cozad argued that by going to work instead of to the sheriff’s office, he was acting to avoid the harm to the community of prolonged homelessness of a sex offender, which was greater than the harm of violating the technical requirement of an in-person check-in. CP 48-49. The court refused to give the instruction, holding there was not sufficient evidence. RP 169. Cozad objected to the court’s decision not to give the instruction. RP 176.

The jury found Cozad guilty. RP 211, CP 45-46. The court imposed a sentence of 25 months in prison with credit for time served. RP 222, CP 54. Cozad appealed. CP 67.

4. Summary of Argument

This Court reviews errors in jury instructions de novo, as noted in Part 5.1, below. Part 5.2 will demonstrate that Cozad lacked a “fixed residence” under the statutory definition and therefore the trial court erred in amending jury instruction 13 to include registration requirements that apply only to offenders who have a “fixed residence.” Part 5.3 will then show that

because there was sufficient evidence to support Cozad's defense of necessity, the trial court committed reversible error by refusing to instruct the jury on the defense. These two errors allowed the jury to convict Cozad on the basis of a misunderstanding of the law. This Court should reverse and remand for a new trial.

5. Argument

5.1 Errors in jury instructions are reviewed de novo.

Appellate courts review errors in jury instructions de novo. *State v. Becklin*, 163 Wn.2d 519, 525, 182 P.3d 944 (2008). The trial court's determination of whether to instruct the jury on an affirmative defense is a question of law reviewed de novo. *State v. Kurtz*, 178 Wn.2d 466, 469, 309 P.3d 472 (2013). "In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses' credibility, which are exclusive functions of the jury." *State v. May*, 100 Wn. App. 478, 482, 997 P.2d 956 (2000). The defendant's testimony alone may be sufficient evidence to warrant an instruction. *See Id.* at 481-82. If evidence supports the defense, it is reversible error to refuse to give the instruction. *State v. Ager*, 128 Wn. 2d 85, 93, 904 P.2d 715 (1995).

5.2 The trial court erred when it instructed the jury regarding registration requirements that apply only to offenders with a “fixed residence.”

A criminal defendant is entitled to a jury instruction on a defense theory of the case when the evidence warrants it. *Ager*, 128 Wn. 2d at 93. The same rule applies to the State’s theory of the case. Refusal to give an instruction warranted by the evidence is reversible error. *Id.* Conversely, it is error to **give** an instruction that is **not** supported by the evidence. *Id.*

At the close of testimony, the trial court, at the request of the State, amended jury instruction 13 as follows (additions underlined):

A person who is required to register as a sex offender must comply with certain requirements of registration, including the following:

(1) the requirement that the defendant, lacking a fixed residence, report weekly, in person, to the sheriff of the county where the defendant is registered

(2) the requirement that the defendant, lacking a fixed residence, comply with a request from the county sheriff for an accurate accounting of where the defendant stayed during the week.

(3) the requirement that the defendant provide the following information when registering: complete and accurate residential address or, if the defendant lacks a fixed residence, where the defendant plans to stay.

(4) the requirement that the defendant provide, in person or by certified mail with return receipt requested, signed written notice of a change of address within three business days of the change of address to the county sheriff with whom the defendant is registered.

CP 38; *see* RP 169-70. The State argued that Cozad actually had a fixed residence and therefore failed to comply with these additional requirements. RP 194-96. These amendments were not supported by the evidence because, under the applicable statutory definitions, Cozad did not have a fixed residence. The trial court erred in granting the amendments.

The State based its arguments on the following testimony from Cozad:

Q: [By defense counsel] And when you went in and registered on April 18, 2014, what did you put down as your address at that point?

A: At that point in time I registered as homeless, but that wasn't entirely accurate. DOC had been hounding my apartment manager three to four days a week if I was on the lease.

Q: Okay.

A: Unfortunately as a felon, I cannot get on the lease here in this town. The manager was aware and per DOC policy that is all they needed was they needed to be aware that I was living there. But because they were constantly being harassed by DOC, the manager asked if I could leave the premises.

RP 142-43.

However, under the statutory definitions, this testimony cannot support a conclusion that Cozad had a fixed residence. For purposes of sex offender registration requirements, “fixed residence” is defined as follows:

“Fixed residence” means a building that a person **lawfully** and habitually uses as living quarters a majority of the week. Uses as living quarters means to conduct activities consistent with the common understanding of residing, such as sleeping; eating; keeping personal belongings; receiving mail; and paying utilities, rent, or mortgage. ...

RCW 9A.44.128(5) (emphasis added). The statute also defines what it means to “lack[] a fixed residence” for registration purposes:

“Lacks a fixed residence” means the person does not have a living situation that meets the definition of a fixed residence and includes, but is not limited to, a shelter program designed to provide temporary living accommodations for the homeless, an outdoor sleeping location, **or locations where the person does not have permission to stay.**

RCW 9A.44.128(9) (emphasis added).

Cozad’s testimony explained that he did not have permission to stay at the apartment. RP 143. The apartment manager—the agent of the property owner—had asked him to leave the premises. Cozad no longer had permission—from the only person whose permission mattered—to lawfully use the

apartment as living quarters. Cozad explained the situation further:

Q: And at that time where were you – and I say at that time, April 18 to May 28, 2014, where were you sleeping from I guess 8:00 p.m. until 4:00 a.m. or whatever your sleeping habits would be?

A: Well, from roughly –

Q: It doesn't matter what time you go to bed. My point is when you were sleeping those nights, was it in your truck? In an apartment?

A: No, I was actually sleeping back at my apartment with my girlfriend because the office was closed at the time. And so the manager left at 6:00 p.m., and the manager got there at about six, seven o'clock in the morning. So I'd come in after work, after the manager is gone, and I'd be gone by 4:30 in the morning before the manager was even there so – because it was giving me a place to stay, and we were trying not to have my girlfriend lose her apartment.

Q: So were you giving her some of your paycheck for her apartment?

A: Yes.

Q: And did you ever think to go back to these people and/or mail them a letter and say, hey, I'm living back at this apartment; I'm no longer really homeless?

A: I had contacted the sheriff's office to let them know where I would stay, and when I was in my truck, when I was at the apartment, or when I was in a hotel. And so they knew where I was at all points in time.

RP 147-48. Cozad was sleeping at the apartment secretly, hiding from the apartment manager because he knew that he did not have permission to lawfully stay at the apartment. Cozad was, in fact, transient, occasionally staying in his truck or in a hotel rather than in the apartment.

Under the statutory definitions, Cozad lacked a fixed residence. The apartment was not a “fixed residence” because Cozad could not “lawfully ... use[the apartment] as living quarters.” *See* RCW 9A.44.128(5). Cozad “lack[ed] a fixed residence” because the apartment was a “location[] where the person does not have permission to stay.” *See* RCW 9A.44.128(9).

The State did not present any other evidence that Cozad had a fixed residence meeting the statutory definition or that Cozad failed to inform the sheriff’s office of where he stayed. Because there was no evidence to support parts (3) and (4) of the amended instruction, it was error for the trial court to give the amended instruction to the jury.

This error is of constitutional magnitude under rights of due process, therefore it can be raised for the first time on appeal. RAP 2.5(a). The jury must be instructed on all essential elements of the crime charged. U.S. Const. amend. VI; Wash. Const. art. I, § 22. An instruction omitting an essential element of a crime permits the jury to convict without proof of each element of the crime beyond a reasonable doubt. *State v.*

Linehan, 147 Wn.2d 638, 654, 56 P.3d 542 (2002). Similarly, an instruction that includes inapplicable alternative elements permits the jury to convict on a basis that is contrary to the law. Such an error is a violation of due process and harmless only if the reviewing court is “convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error.”

Id.

Instruction 13, as amended, includes alternative elements that do not apply as a matter of law. The instruction permitted the jury to convict Cozad for failure to register on the basis of requirements that did not apply to him. This is a violation of due process and is enough to require remand for a new trial.

This error is not harmless. Assuming that the jury had been properly instructed on only those requirements that apply to an offender who “lacks a fixed residence,” a reasonable jury would not necessarily reach the same result. Although Cozad admittedly failed to check-in in person, he had an affirmative defense on which a reasonable jury might have acquitted him. *See* Part 5.3, below.

To the extent this constitutional error is not sufficiently “manifest,” Cozad’s trial counsel provided ineffective assistance in failing to object and preserve the issue for appeal. Criminal defendants are constitutionally guaranteed the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668,

685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I, § 22. Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. *Thomas*, 109 Wn.2d at 225-26. Prejudice is a reasonable probability that the result would have been different but for counsel's deficient performance. *Id.* at 226.

Trial counsel's failure to object to the amended instruction was deficient performance. The statutory definitions are clear. There was no evidence to support the State's new-found "fixed residence" theory. Objectively, trial counsel should have recognized that the State was not entitled to the amendments on the basis of the evidence that had been presented.

Trial counsel's failure to object prejudiced Cozad because it allowed the State to present argument on its "fixed residence" theory, even though that theory was contrary to law and to the evidence. This permitted the jury to convict Cozad on a basis contrary to law, in violation of Cozad's rights of due process. Had trial counsel timely objected, the trial court could have corrected its error, and even if not, the issue would have been preserved for appeal. Had the trial court corrected its error and also

instructed the jury on the necessity defense, there is a reasonable probability the result would have been different.

Whether as a manifest constitutional error or as a consequence of trial counsel's ineffective assistance, this Court should review the amendments to jury instruction 13 and hold that they were not supported by the law or the evidence, requiring remand for a new trial.

5.3 The trial court erred when it refused to instruct the jury on the defense of necessity.

The common law necessity defense is available when natural physical forces or the pressure of events cause the defendant to act unlawfully in order to avoid a harm social policy deems more serious than the harm resulting from a violation of the law. *State v. Diana*, 24 Wn. App. 908, 913-14, 604 P.2d 1312 (1979). The defense is not applicable where the defendant creates the situation or where there is a reasonable legal alternative to violating the law. *Id.* The defendant bears the burden of proving this affirmative defense by a preponderance of the evidence. *Id.* at 916.

As noted above, a criminal defendant is entitled to a jury instruction on a defense theory of the case when the evidence warrants it. *Ager*, 128 Wn. 2d at 93. Refusal to give an instruction warranted by the evidence is reversible error. *Id.*

Cozad's theory of the case was that the pressure of circumstances made it necessary for him to violate the technical requirement of in-person check-in with the sheriff's office each week—though he called in to make sure the sheriff's office knew of his whereabouts—in order to avoid the greater harm of him becoming unemployed and permanently homeless. *See, e.g.*, CP 48-49; RP 168. Cozad presented sufficient evidence to warrant an instruction on the necessity defense, but the trial court refused to give it. This Court should reverse and remand for a new trial.

Cozad requested the trial court give WPIC 18.02, which reads as follows:

Necessity is a defense to a charge of (fill in crime) if

- (1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and
- (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law; and
- (3) the threatened harm was not brought about by the defendant; and
- (4) no reasonable legal alternative existed.

The defendant has the burden of proving this defense 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. If you find that the defendant has established

this defense, it will be your duty to return a verdict of not guilty [as to this charge].

WPIC 18.02. This instruction was supported by the evidence.

Cozad reasonably believed that violating the in-person check-in requirement was necessary to avoid losing his job, which would have resulted in him becoming permanently homeless. The sex offender registration statute requires an offender who lacks a fixed residence to check-in weekly with the county sheriff's office:

A person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. The person must keep an accurate accounting of where he or she stays during the week and provide it to the county sheriff upon request. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

RCW 9A.44.130(6)(b).

Cozad's work schedule made it impossible for him to check-in in person during normal business hours and also keep his job. The county sheriff's office had designated Tuesdays as the transient sex offender check-in day. RP 84-85. The sheriff's office offered no flexibility as to the check-in day. *See. e.g.*

RP 96, 104-05,¹ 112. Cozad's work schedule kept him occupied and unable to check-in from 5:00 a.m. to 8:00 p.m. on Tuesdays. RP 144. Cozad was not even permitted to have a cell phone or make phone calls during work hours. RP 146, 148-49. Violation of work rules would result in termination of employment. *See* RP 149. Cozad was making "good money" at his job and was contributing money to help his girlfriend pay the rent and keep the apartment. RP 148-49. Cozad reasonably believed that if he left the worksite to check-in in person at the sheriff's office, he would lose his job, his income, and his (unlawful) occasional residence. Under the circumstances, it was necessary for him to violate the in-person check-in requirement in order to avoid a greater harm.

The harm Cozad sought to avoid was becoming unemployed and permanently homeless. The sex offender registration statute recognizes that a homeless sex offender poses a higher risk to the public than one with a fixed residence. *See* RCW 9A.44.130(6)(b) ("The lack of a fixed residence is a factor that may be considered in determining an offender's risk level...").

¹ The testimony on pages 103-06 was elicited as an offer of proof. The trial court excluded the entire line of questioning as irrelevant. RP 106-08. The trial court abused its discretion because the testimony was relevant to Cozad's necessity defense. *See* below, pages 19-20.

This increased risk to the public is a greater harm than the harm caused by Cozad's failure to appear in-person each Tuesday. At most, Cozad's failure to appear meant that the sheriff's office did not receive Cozad's report of where he had been over the past week until Wednesday morning when the office received the detailed voice message Cozad left each Tuesday night. *See* RP 106 (messages received by sheriff's office), 146 (left detailed messages), 148 (told sheriff's office where he was staying each night). The purpose of the registration requirements is to provide law enforcement with information regarding sex offenders within their jurisdiction. Laws of 1990, ch. 3, § 402. This purpose was fulfilled by Cozad's phone calls, albeit somewhat later in time than would have been accomplished through in-person check-in during business hours, had Cozad been available to do so. The harm of Cozad's violation is small in comparison to the harm that could have resulted had Cozad sacrificed his employment in order to fulfill the letter of the law.

The threat of harm was not brought about by Cozad's actions. The threat of harm exists because the statute allows check-in only on a single day of the week, during business hours, leaving no flexibility for unusual cases such as this, where it was simply impossible for Cozad to comply while keeping his job.

No reasonable legal alternative existed. The statute requires in-person check-in on a single day of the week during business hours. Cozad was at work on Tuesdays during business hours. He could not get away. He did the best he could by calling in, but the sheriff's office did not offer any alternative to in-person check-in.

Sufficient evidence supported each of the elements of the necessity defense. The trial court committed reversible error in refusing to give the instruction.

The trial court also abused its discretion in excluding, as irrelevant, evidence that was relevant to the necessity defense. One prime example of this is the offer of proof at RP 103-06. Defense counsel elicited testimony that the sheriff's office would not offer any alternative to in-person check-in on Tuesdays during business hours (RP 104-05) and that the sheriff's office received Cozad's voice messages (RP 106).

The trial court excluded testimony relating to the sheriff's office's inflexibility, reasoning that it would only be relevant if there were testimony that the sheriff's office actually offered Cozad some accommodation. RP 107. However, the actual testimony elicited—that the sheriff's office would not offer any alternative—was also relevant to Cozad's necessity defense, as shown above.

The trial court also excluded testimony that the sheriff's office received Cozad's voice messages, on the grounds that it would only be relevant if the sheriff's office received the messages and then offered some accommodation. RP 108. However, the fact that the sheriff's office received the information required by statute and provided by Cozad in his voice messages is itself relevant to the necessity defense, showing that the harm of Cozad's violation was de minimis, as shown above.

The trial court abused its discretion in excluding evidence relevant to the necessity defense, and then subsequently refusing to instruct the jury on the defense, citing a lack of evidence. *See* RP 169. There was, in fact, sufficient evidence to support the elements of the necessity defense. Cozad was entitled to have the jury instructed on the defense. The trial court's refusal to give the instruction was reversible error. This Court should reverse and remand for a new trial.

6. Conclusion

The trial court erred in amending jury instruction 13 to include alternative requirements that could not apply to Cozad under the undisputed evidence. To the extent defense counsel failed to object to the amendment, defense counsel provided ineffective assistance that prejudiced Cozad. The trial court also

erred by refusing to instruct the jury on the necessity defense when the defense was supported by substantial evidence. To the extent the trial court excluded additional evidence relevant to the defense, it abused its discretion. This Court should reverse and remand for a new trial.

Respectfully submitted this 13th day of June, 2016.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on June 13, 2016, I caused the original of the foregoing document to be filed and served by the method indicated below, and addressed to each of the following:

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DATED this 13th day of June, 2016.

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