FILED
Court of Appeals
Division II
State of Washington
4/12/2019 8:00 AM

NO. 52574-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

CLARA CHRISTENSEN,
Appellant.

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

Clark County Cause No. 17-1-02081-8

The Honorable Robert A. Lewis, Judge

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# BRIEF OF APPELLANT

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Skylar T. Brett
Attorney for Appellant

LAW OFFICE OF SKYLAR BRETT, PLLC
PO BOX 18084
SEATTLE, WA 98118
(206) 494-0098
skylarbrettlawoffice@gmail.com

## TABLE OF CONTENTS

**TABLE OF CONTENTS……...i**

**TABLE OF AUTHORITIES ..... ii**

**ISSUES AND ASSIGNMENTS OF ERROR ..... 1**

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

**ARGUMENT ..... 6**

**I. Ms. Christensen's defense attorney provided ineffective assistance of counsel by failing to propose a jury instruction on the defense of necessity to the hit and run charge. ..... 6**

A. Ms. Christensen was entitled to a jury instruction on the defense of necessity because she fled the scene of the accident for her own safety. ..... 9

B. Ms. Christensen's defense attorney provided ineffective assistance by failing to propose a jury instruction on the necessity defense to the hit and run charge. ..... 14

C. Ms. Christensen was prejudiced by her attorney's deficient performance because it left the jury with the misconception that conviction for hit and run was required *even if* Ms. Christensen had left the scene of the accident for her own safety. ..... 17

**II. The trial court erred by ordering Ms. Christensen – who is indigent – to pay a $200 criminal filing fee. ..... 19**

**CONCLUSION ..... 20**

## TABLE OF AUTHORITIES

### FEDERAL CASES

*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ..... 15

*United States v. Agard*, 605 F.2d 665 (2d Cir.1979) ..... 11

*United States v. Bailey*, 444 U.S. 394, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980) ..... 10, 12

*United States v. Harper*, 802 F.2d 115 (5th Cir.1986) ..... 11

*United States v. Lemon*, 824 F.2d 763 (9th Cir. 1987) ..... 11

*United States v. Paolello*, 951 F.2d 537 (3d Cir.1991) ..... 11

### WASHINGTON STATE CASES

*In re Davis*, 152 Wn.2d 647, 101 P.3d 1 (2004) ..... 8, 15

*In re Hubert*, 138 Wn. App. 924, 158 P.3d 1282 (2007) .. 14, 15, 17, 18, 19

*State v. Aver*, 109 Wn.2d 303, 745 P.2d 479 (1987) ..... 9

*State v. Diana*, 24 Wn. App. 908, 604 P.2d 1312 (1979) ..... 9, 11, 12

*State v. Estes*, 188 Wn.2d 450, 395 P.3d 1045 (2017) ..... 8

*State v. Gallegos*, 73 Wn. App. 644, 871 P.2d 621 (1994) ..... 9, 10

*State v. Jeffrey*, 77 Wn. App. 222, 889 P.2d 956 (1995) ..... 10, 11, 12, 13

*State v. Jones*, 183 Wn.2d 327, 352 P.3d 776 (2015) ..... 8, 19

*State v. Kyllo*, 166 Wn.2d 856, 215 P.3d 177 (2009) ..... 8

*State v. McNeal*, 145 Wn.2d 352, 37 P.3d 280 (2002) ..... 9

*State v. Niemczyk*, 31 Wn. App. 803, 644 P.2d 759 (1982) ..... 12

*State v. Powell*, 150 Wn. App. 139, 206 P.3d 703 (2009) . 8, 14, 15, 17, 18, 19

*State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018) ..... 19

*State v. Stockton*, 91 Wn. App. 35, 955 P.2d 805 (1998) ..... 11, 12

*State v. Turner*, 42 Wn. App. 242, 711 P.2d 353 (1985) ..... 11, 12

*State v. Ward*, 77044-6-I, 2019 WL 1513834, --- Wn. App. ---, --- P.3d --- (Wash. Ct. App. Apr. 8, 2019) ..... 7, 9, 10, 13

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. VI ..... 1, 7

U.S. Const. Amend. XIV ..... 1, 7

Wash. Const. art. I, § 22 ..... 8

**STATUTES**

RCW 10.01.160 ..... 20

RCW 36.18.020 ..... 1, 20

RCW 46.52.020 ..... 12, 13, 14, 16, 17

RCW 9A.16.060 ..... 12

**OTHER AUTHORITIES**

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 18.02 (4th ed. 2016) ..... 11

HB 1783 ..... 19

*Johnson v. State,* 650 S.W.2d 414 (Tex.Crim.App.1983) ..... 11

Laws of 2018 ..... 20

*Mungin v. State*, 458 So.2d 293 (Fla.Dist.Ct.App.1984) ..... 10

*People v. Govan*, 169 Ill.App.3d 329, 119 Ill.Dec. 825, 523 N.E.2d 581 (1988) ..... 10

*People v. King*, 22 Cal.3d 12, 582 P.2d 1000, 148 Cal.Rptr. 409 (1978). 10

*People v. Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (Cal. Ct. App. 1974) ..... 10, 12

*People v. Unger*, 66 Ill. 2d 333, 362 N.E.2d 319 (1977) ..... 10, 12

*State v. Blache*, 480 So.2d 304 (La.1985) ..... 11

*State v. Crawford*, 308 Md. 683, 521 A.2d 1193 (1987) ..... 11

*State v. Reese*, 272 N.W.2d 863 (Iowa 1978) ..... 10, 12

*State v. Spaulding*, 296 N.W.2d 870 (Minn.1980) ..... 11

*State v. Walton*, 311 N.W.2d 113 (Iowa 1981) ..... 11

## ISSUES AND ASSIGNMENTS OF ERROR

1. Ms. Christensen was deprived of her Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Ms. Christensen's defense attorney provided ineffective assistance of counsel by failing to propose a jury instruction on the defense of necessity to the hit and run charge.
3. Ms. Christensen was prejudiced by her attorney's deficient performance.

> **ISSUE 1:** A criminal defense attorney provides ineffective assistance of counsel by failing to propose and argue an available defense when that failure leaves the jury with no understanding of the legal significance of facts which would, otherwise, require acquittal. Did Ms. Christensen's attorney provide ineffective assistance by failing propose a jury instruction on the defense of necessity to his client's hit and run charge when she had failed to provide the information required by the hit and run statute only because she was fleeing from a physical attack?

4. The sentencing court erred by entering Finding of Fact 2.5 on the Judgment and Sentence.
5. RCW 36.18.020(2)(h) prohibits the court from imposing a criminal filing fee on Ms. Christensen because she is indigent.
6. The sentencing court erred by ordering Ms. Christensen to pay a $200 criminal filing fee.

> **ISSUE 2:** RCW 36.18.020(2)(h) applies retroactively to all cases pending on appeal and prohibits the imposition of a criminal filing fee on an indigent person. Must this Court strike the order for Ms. Christensen to pay that fee from her Judgement and Sentence because she is indigent?

## STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Clara Christensen spent the day with her sister, Donna Rankins. RP 231-37. Ms. Christensen does not drink, but Rankins drank vodka throughout the day and became drunk. RP 233, 238.

That evening, Rankins had a fight with her boyfriend and demanded that Ms. Christensen give her a ride to their mother's house. RP 237.

While in the car, Rankins began attacking Ms. Christensen while she was driving. See RP 240-46. Rankins accused Ms. Christensen of taking her boyfriend's side in the argument. RP 240. Rankins tried to grab the steering wheel while Ms. Christensen was driving. RP 242.

Then Rankins started hitting Ms. Christensen as she drove. RP 243. Ms. Christensen stopped the car and told Rankins to get out. RP 245. Rankins grabbed Ms. Christensen's hair, wedged her feet against the dashboard, and pulled until Ms. Christensen felt her neck begin to pop. RP 245-46.

Ms. Christensen had to strike her sister's arms to try to get Rankins to let go of her hair. RP 246. Rankins eventually started to release her grip. RP 246. As that happened, Ms. Christensen accidentally hit her sister in the face. RP 247.

Ms. Christensen told Rankins to get out of the car, reached over and removed her sister's seatbelt, and opened the passenger door. RP 247. Rankins held the seatbelt in her hand with her back against the partially-open door. RP 247. Then she threw another punch at Ms. Christensen, which caused Rankins to lose her balance and fall out of the car and into a large ditch. RP 248.

Ms. Christensen got out of the car and walked over to try to help her sister. RP 249. But Rankins continued to hit and kick Ms. Christensen. RP 249. Ms. Christensen told Rankins that she was "done," and Rankins slammed the door to the car. RP 249.

Ms. Christensen got back into the driver's seat and started to drive away. RP 249. But Ms. Christensen heard Rankins screaming outside so she stopped again to see what was happening. RP 249.

Once back outside, Ms. Christensen saw that Rankins had shut the car door with the seatbelt dangling outside and had become tangled in the seatbelt. RP 250. Rankins had been pinned against the car door by the seatbelt while Ms. Christensen drove the length of one residential lot. RP 251. Only Rankins's feet were touching the ground during that time. RP 250.

Ms. Christensen tried to help her sister again, but Rankins continued her assaultive behavior and threatened to kill Ms. Christensen.

RP 251. Rankins eventually walked away but told Ms. Christensen that she would call the police and tell them that Ms. Christensen had tried to kill her if Ms. Christensen followed her. RP 252. Ms. Christensen got back into the car and drove away. RP 251.

Rankins sustained a broken nose from when Ms. Christensen accidentally hit her in the face while she was trying to get her sister to let go of her hair. RP 43, 247. Rankins also had a large abrasion on her hip and smaller abrasions on her knees and elbows from when she fell out of the car and into the ditch. RP 50, 248.

Rankins flagged down some passersby and asked them to call 911. RP 57. Rankins told the paramedics and the police that Ms. Christensen had attacked her. RP 109. She also claimed that the abrasions on her hip, knees, and elbows were caused when she was dragged by Ms. Christensen's car. RP 109.

When Ms. Christensen found out that the police were looking for her, she turned herself in. RP 253. The state charged Ms. Christensen with second-degree assault (for the events inside the car), vehicular assault, and hit and run from an injury accident. CP 1-2.

At trial, Rankins admitted that she was "lit" (meaning drunk) on the day of the incident. RP 68. But Rankins claimed that Ms. Christensen had begun punching her out of the blue while they were in the car. RP 43,

47. Rankins admitted that Ms. Christensen had not known that she was stuck in the seatbelt when she drove away, but claimed that the abrasions on her hip, knees, and elbows had been caused by that accident, not by falling into the ditch. RP 48-50, 82-83.

Rankins admitted to the jury that she had threatened to kill Ms. Christensen at the end of the fight in the car. RP 83. She also admitted that Ms. Christensen had repeatedly asked her to get out of the car and that she had refused to do so. RP 84.

The jury believed Ms. Christensen's version of events, not that offered by the state. *See* CP 43-44. Apparently determining that Ms. Christensen had acted in self-defense when she hit her sister; and that she had not driven recklessly and/or that Rankins had not been injured when she was tangled in the seatbelt, the jury acquitted Ms. Christensen of the assault and vehicular assault charges. CP 43-44.

But Ms. Christensen's defense attorney did not propose jury instructions regarding any defenses to the hit and run charge. *See* CP 8-10.

Instead, the instructions informed the jury that they were required to convict Ms. Christensen of that charge if she knew that she had been involved in an accident and failed to stop to give Rankins her name, car insurance information, etc, regardless of her reasons for declining to do so. CP 37.

Accordingly, the court's instructions required the jury to convict Ms. Christensen of the hit and run charge even if it found that she had fled from the accident for her own safety. CP 37.

The jury found Ms. Christensen guilty of the felony hit and run charge. CP 45.

At sentencing, the court found Ms. Christensen indigent for purposes of appeal. CP 61-62. But the court also checked a box on the Judgment and Sentence indicating that Ms. Christensen was not indigent. CP 49. The court ordered Ms. Christensen to pay a $200 criminal filing fee. CP 52.

This timely appeal follows. CP 60.

## ARGUMENT

### I. MS. CHRISTENSEN'S DEFENSE ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO PROPOSE A JURY INSTRUCTION ON THE DEFENSE OF NECESSITY TO THE HIT AND RUN CHARGE.

Rankins had attacked Ms. Christensen and threatened to kill her immediately before Ms. Christensen left the scene of the accident. *See* RP 240-52.

Even so, the jury's instruction required conviction for hit and run based on Ms. Christensen's failure to provide Rankins with her insurance

information, car license number, etc., regardless of her reasons for failing to do so. CP 37.

There was a solution available to this problem: the common law defense of necessity permitted the jury to acquit Ms. Christensen of the hit and run charge – despite her technical violation of the statute – if it found that Ms. Christensen needed to leave the scene for her own safety so long as she had not caused the circumstances herself. *See State v. Ward*, 77044-6-I, 2019 WL 1513834, at *1, --- Wn. App. ---, --- P.3d --- (Wash. Ct. App. Apr. 8, 2019).

But Ms. Christensen's defense attorney appears to have been unaware of that option. *See* CP 8-10; RP 329-30. He did not propose a jury instruction on the defense of necessity and argued only an incomplete defense to the hit and run charge in closing. CP 8-10; RP 329-30.

Ms. Christensen's counsel provided ineffective assistance by failing to research the relevant law and by failing to propose and argue the only defense available to his client for the hit and run charge.

The state and federal constitutions both protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; Wash.

Const. art. I, § 22; *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015).[1]

In order to demonstrate ineffective assistance of counsel, the accused must show deficient performance and prejudice. *Id.* Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Id.* The accused is prejudiced by counsel's deficient performance if there is a reasonable probability[2] that his/her attorney's mistakes affected the outcome of the proceedings. *Id.*

Defense counsel provides ineffective assistance by failing to propose a jury instruction necessary to his/her client's defense. *State v. Powell*, 150 Wn. App. 139, 156, 206 P.3d 703 (2009). A defense attorney also provides unreasonable representation by failing to research the law relevant to the case. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Furthermore, any tactical decision by defense counsel must be *reasonable* in order to constitute effective assistance. *See In re Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (*cting State v. McNeal*, 145 Wn.2d

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[1] Ineffective assistance of counsel claims are reviewed *de novo*. *Jones*, 183 Wn.2d at 338.

[2] A "reasonable probability" under the prejudice standard is lower than the preponderance of the evidence standard. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Rather, "it is a probability sufficient to undermine confidence in the outcome." *Id.*; *see also Jones*, 183 Wn.2d at 339.

352, 362, 37 P.3d 280 (2002)). Even deliberate tactical choices can constitute ineffective assistance of counsel if they fall outside the range of "competent assistance." *Id.*

A. Ms. Christensen was entitled to a jury instruction on the defense of necessity because she fled the scene of the accident for her own safety.

Washington has long recognized a common law defense of necessity in criminal cases. *Ward*, 77044-6-I, 2019 WL 1513834, at *1; *State v. Diana*, 24 Wn. App. 908, 914, 604 P.2d 1312 (1979). Necessity is available as a defense when "the pressure of circumstances cause the accused to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from a violation of the law" and where no legal alternative is available to the accused. *Id.* at *3 (*quoting State v. Gallegos*, 73 Wn. App. 644, 651, 871 P.2d 621 (1994)); *Diana*, 24 Wn. App. at 913-14. This is because an otherwise-unlawful act is justified by necessity when it is "taken in a reasonable belief that the harm or evil to be prevented by the act is greater than the harm caused by violating the criminal statute." *Id.* (*quoting State v. Aver*, 109 Wn.2d 303, 311, 745 P.2d 479 (1987)).

To successfully raise the defense of necessity, the accused must demonstrate by a preponderance of the evidence that: (1) s/he reasonably believed that the commission of the crime was necessary to avoid or

mitigate a harm, (2) the harm sought to be avoided was greater than the harm resulted by the criminal violation, (3) the defendant did not cause the threatened harm, and (4) the accused had no reasonable legal alternative to violating the law. *Ward*, slip op, at *3 (*citing Gallegos*, 73 Wn. App. at 650); *see also State v. Jeffrey*, 77 Wn. App. 222, 224–25, 889 P.2d 956 (1995).

Thus, for example, numerous jurisdictions, including Washington, have recognized the availability of a necessity defense to an escape charge when the accused person escapes from custody in order to flee actual or threatened violence against him/her. *See e.g. United States v. Bailey*, 444 U.S. 394, 409–10, 100 S.Ct. 624, 634, 62 L.Ed.2d 575 (1980); *State v. Reese*, 272 N.W.2d 863, 866 (Iowa 1978); *People v. Unger*, 66 Ill. 2d 333, 362 N.E.2d 319 (1977); *People v. Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (Cal. Ct. App. 1974).

Necessity is also an available defense to a charge of unlawful possession of a firearm when the accused reasonably believes that s/he needs to possess a gun in order to protect him/herself from an imminent threat of violence. *Jeffrey*, 77 Wn. App. at 226 (*citing People v. King*, 22 Cal.3d 12, 582 P.2d 1000, 148 Cal.Rptr. 409 (1978); *Mungin v. State*, 458 So.2d 293 (Fla.Dist.Ct.App.1984); *People v. Govan*, 169 Ill.App.3d 329, 119 Ill.Dec. 825, 830, 523 N.E.2d 581 (1988); *State v. Walton*, 311

N.W.2d 113 (Iowa 1981); *State v. Blache*, 480 So.2d 304 (La.1985); *State v. Crawford*, 308 Md. 683, 521 A.2d 1193, 1199 (1987); *State v. Spaulding*, 296 N.W.2d 870 (Minn.1980); *Johnson v. State*, 650 S.W.2d 414 (Tex.Crim.App.1983)); *See also United States v. Paolello*, 951 F.2d 537 (3d Cir.1991); *United States v. Lemon*, 824 F.2d 763, 765 (9th Cir. 1987); *United States v. Harper*, 802 F.2d 115, 117 (5th Cir.1986); *United States v. Agard*, 605 F.2d 665 (2d Cir.1979).[3]

Any accused person who demonstrates facts supporting the elements of the necessity defense is entitled to an instruction explaining the defense to the jury. *State v. Stockton*, 91 Wn. App. 35, 43, 955 P.2d 805 (1998).[4]

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[3] Under federal law, the elements of the necessity defense to a charge of unlawful possession of a firearm requires the accused to demonstrate that: (1) s/he was under unlawful and present threat of death or serious injury, (2) s/he did not recklessly place him/herself in a situation where s/he would be forced to engage in criminal conduct, (3) s/he had no reasonable alternative, and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm. *See Jeffrey*, 77 Wn. App. at 225.

[4] As noted in the comment to the Washington Pattern Jury Instruction for the necessity defense, the Court in a 1985 case, *State v. Turner*, 42 Wn. App. 242, 247, 711 P.2d 353 (1985), claimed that necessity was only available as a defense when the pressures leading to an offense came "from physical forces of nature," rather than from human beings. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 18.02, at 292 (4th ed. 2016) (*quoting Turner*, 42 Wn. App. at 247). Notably, however, that portion of *Turner* was *dicta* as the Court otherwise held that that the defense of duress was applicable to that case. *Turner*, 42 Wn. App. at 247. The *Turner* Court relied on the prior *Diana* case, which stated that:

> Generally, necessity is available as a defense when the physical forces of nature *or the pressure of circumstances* cause the accused to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from a violation of the law.

(Continued)

Ms. Christensen was entitled to a jury instruction on the necessity defense to her hit and run charge[5], which the state proved by demonstrating that she had left the scene of the accident without providing Rankins with her name, address, insurance company, insurance policy

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*Diana*, 24 Wn. App. at 913–14 (emphasis added). The *Turner* Court misquoted the *Diana* Court by omitting the critical language regarding other "pressure of circumstances."

As further noted by the WPIC Commentators, subsequent Washington cases have not drawn the distinction between forces of nature and the threat of harm by another person. *See* 11 Wash. Prac., Pattern Jury Instr. Crim. at 292 (*citing Jeffrey*, 77 Wn. App. 222; *Stockton*, 91 Wn. App. 35). As a result, the Washington Pattern Instruction on the necessity defense does not require the pressure to have come from the "forces of nature," but only that the accused "reasonably believed that the commission of the crime was necessary to avoid or minimize a harm…" WPIC 18.02.

Numerous other jurisdictions have also applied the necessity defense to circumstances in which unlawful action must be excused because it was necessary to flee harm threatened by another person. *See e.g. Reese*, 272 N.W.2d at 866; *Unger*, 66 Ill. 2d 333; *Lovercamp*, 43 Cal. App. 3d 823.

The United States Supreme Court has also noted that the distinction between the defenses of necessity and duress has been blurred in this regard, discussing the issue, instead, in terms of whether an instruction on "duress or necessity" was warranted. *Bailey*, 444 U.S. at 409–10.

Ms. Christensen discusses this issue in terms of necessity because the defense of duress has been codified in Washington at RCW 9A.16.060 in terms that require "compulsion" to commit a crime by another person. RCW 9A.16.060. This Court has held that the "compulsion" element of the duress statute requires the type of force or threat designed to "coerce" the accused into committing a crime. *State v. Niemczyk*, 31 Wn. App. 803, 806–07, 644 P.2d 759 (1982) (holding that the necessity defense – not duress – applies to cases in which a person escapes from custody in order to flee violence).

[5] Logically, hit and run is exactly the type of charge for which the necessity defense is required. The hit and run statute places enumerated duties upon any person "involved in an accident," regardless of whether s/he caused that accident. *See* RCW 46.52.020.

Accordingly, an ill-intentioned person could instigate an attack on an innocent person by intentionally causing him/her to be "involved in an accident" and thereby triggering the duty for him/her to stop and provide the listed information. Without the availability of the necessity defense – permitting the innocent party to lawfully violate the statute in order to escape the malicious party – the duties created by the hit and run statute could be purposefully used to cause harm, rather than to prevent it.

(Continued)

number, or vehicle license number. RCW 46.52.020(3);[6] *Ward*, slip op, at *3; *Jeffrey*, 77 Wn. App. at 224-25.

First, Ms. Christensen, had been attacked by Rankins and Rankins threatened to kill Ms. Christensen immediately before Ms. Christensen left the scene of the accident without providing medical assistance, her car insurance information, driver's license, etc. RP 83, 242-52. Ms. Christensen reasonably believed that violation of the hit and run statute was necessary to avoid further assault. *Id.*

Second, the harm that Ms. Christensen avoided by escaping further attack by Rankins was greater than the harm caused by her failing to provide Rankins with further assistance or with her car insurance information, driver's license, etc. *Id.* Rankins's injuries were not life threatening. RP 42, 50, 247-48. She walked away from the scene before Ms. Christensen left, demonstrating that she did not intend to accept any offer of medical assistance. RP 252. Rankins also already knew her sister's identity and address, significantly mitigating any harm caused by Ms. Christensen's failure to provide her personal information.

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[6] The hit and run statute also requires a person involved in an injury accident to provide "reasonable assistance" to any injured person. RCW 46.52.020(3). It was disputed at trial whether Rankins required any "reasonable assistance." *See* RP 330. Indeed, Rankins walked away from Ms. Christensen when she was trying to help her. RP 252. Regardless, however, the statute required conviction of Ms. Christensen for failing to provide her insurance information, etc. irrespective of whether Rankins had required any assistance. RCW 46.52.020(3).

Third, Ms. Christensen did not cause Rankins to attack her or to threaten to kill her. *Id.* The jury found as much by believing Ms. Christensen's self-defense claim, acquitting her of the assault charge even though it was undisputed that Rankins's nose had been broken during the fracas. RP 43, 247. Ms. Christensen did not create the circumstances leading to the legal necessity for her to violate the hit and run statute. *Id.*

Finally, Ms. Christensen had no reasonable legal alternative to violating the hit and run statute. *Id.* Complying with the statute would have required Ms. Christensen to provide Rankins with aid and information, such as her car insurance company and policy number and driver's license. RCW 46.52.020(3). She was unable to do so without exposing herself to further violence.

The circumstances of Ms. Christensen's case met each of the elements of the common law defense of necessity. *Id.* She was entitled to a jury instruction explaining that defense to the jury. *Id.*

B. Ms. Christensen's defense attorney provided ineffective assistance by failing to propose a jury instruction on the necessity defense to the hit and run charge.

A defense attorney provides deficient performance by failing to raise or argue an available defense when the facts of the case support the defense. *Powell*, 150 Wn. App. at 155; *In re Hubert*, 138 Wn. App. 924, 929-30, 158 P.3d 1282 (2007). Defense counsel's neglect to familiarize

him/herself with relevant defenses to a charge cannot be characterized as a legitimate trial tactic because it is not based on "reasoned decision-making." *Hubert*, 138 Wn. App. at 929-30 (*citing Strickland v. Washington*, 466 U.S. 668, 690-91, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In fact:

> Where defense counsel fails to identify and present the sole available defense to the charged crime and there is evidence to support that defense, the defendant has been denied a fair trial.

*Id.* 932; *See also Powell*, 150 Wn. App. at 156.

Here, it appears as though Ms. Christensen's defense attorney was unaware of the availability of the necessity defense in his client's case.[7] Instead, defense counsel argued a theory in closing that set forth only an incomplete defense to the hit and run charge. *See* RP 329-30.

Ms. Christensen's counsel argued to the jury, first, that both Ms. Christensen and Rankins testified that Ms. Christensen was not aware that Rankins was trapped by the seatbelt when she drove away. RP 329-30. But it was also undisputed that Ms. Christensen realized what had happened

[7] Even if counsel's failure to propose the instruction was a tactical decision, it was still deficient because it was unreasonable. *See Davis*, 152 Wn.2d at 714; *Hubert*, 138 Wn. App. at 929-30; *Strickland*, 466 U.S. at 690-91. As explained herein, in the absence of an instruction on the necessity defense, counsel argued only an incomplete defense to the hit and run charge to the jury during closing. RP 329-30. Indeed, the jury instructions required the jury to convict Ms. Christensen of that charge even if the jury agreed with everything her attorney argued. CP 37. Counsel's failure to propose the instruction constituted deficient performance regardless of whether Ms. Christensen's attorney knew of the availability of the necessity defense.

shortly thereafter. *See* RP 251-52. The instructions required the jury only to find that Ms. Christensen "knew that she had been involved in an accident." CP 37; *See also* RCW 46.52.020. The fact that Ms. Christensen did not know the accident was happening as it occurred was not an applicable defense to the hit and run charge. CP 37; *See also* RCW 46.52.020.

The only other arguments by Ms. Christensen's attorney regarding the hit and run charge during closing were that Rankins already knew Ms. Christensen's name and address and that Ms. Christensen did not need to provide Rankins with reasonable assistance because Rankins was within walking distance to her mother's house. RP 330.

But the jury instructions required the jury to convict Ms. Christensen of hit and run if she had failed to provide Rankins with her "insurance company, insurance policy number and vehicle license number, and to exhibit her driver's license." CP 37; RCW 46.52.020. The fact that Rankins already knew her name and address is inapposite in light of the fact that Ms. Christensen did not provide that additional information.

Likewise, the instructions required the jury to convict Ms. Christensen of hit and run if she had failed to render reasonable assistance to Rankins, regardless of what other options for assistance may have been

available to her. CP 37; RCW 46.52.020. The fact that Rankins was within walking distance of her mother's house was not relevant.

In the absence of an instruction and accompanying argument regarding the defense of necessity to the hit and run charge, Ms. Christensen's defense attorney's arguments to the jury provided only an incomplete defense to the hit and run charge. RP 329-30. Indeed, the jury could have agreed with all counsel's arguments and still would have been required to convict Ms. Christensen of that charge under the instructions they were given. Defense counsel's decision to rely on the theory he argued in closing for the hit and run charge was neither strategic nor reasonable. *Hubert*, 138 Wn. App. at 929-30; *Powell*, 150 Wn. App. at 156.

Ms. Christensen's defense attorney provided deficient performance by failing to propose a jury instruction on the defense of necessity, which provided the only available *complete* defense to the hit and run charge. *Hubert*, 138 Wn. App. at 929-30; *Powell*, 150 Wn. App. at 155.

C. Ms. Christensen was prejudiced by her attorney's deficient performance because it left the jury with the misconception that conviction for hit and run was required *even if* Ms. Christensen had left the scene of the accident for her own safety.

An accused person is prejudiced by defense counsel's unreasonable failure to propose a jury instruction on an applicable defense

when the jury is left with "no way to understand the legal significance" of the evidence supporting that defense. *Hubert*, 138 Wn. App. at 932; *See also Powell*, 150 Wn. App. at 156-57.

The *Powell* court reversed for ineffective assistance of counsel based on the defense attorney's failure to request a jury instruction on the "reasonable belief" defense to second-degree rape. *Powell*, 150 Wn. App. at 156-57. The Court found that the accused had been prejudiced by counsel's failure because:

> [w]ithout the "reasonable belief" instruction, the jury had (1) no way to recognize and to weigh the legal significance of Powell's testimony and portions of defense counsel's closing argument that it appeared to Powell that PLM had consented; and (2) no way of acquitting Powell even if it believed he had reasonably believed PLM was not mentally incapacitated or physically helpless. Instead, it would have appeared to the jury that it had no option but to convict Powell if it found beyond a reasonable doubt that PLM had been mentally incapacitated or physically helpless, regardless of whether it also found that Powell reasonably believed PLM had consented. The absence of this instruction essentially nullified Powell's defense.

*Id.*

Likewise, in Ms. Christensen's case, counsel's failure to propose a necessity instruction left the jury without any recognition of the legal significance of the fact that Ms. Christensen had left the scene of the accident for her own safety. The jury was unable – under the instructions given – to acquit her of the hit and run charge even if it believed that she

had failed to comply with the duties under the hit and run statute because she was being physically attacked at the time. *Id.*

Furthermore, it is not merely speculative that the jury may have acquitted Ms. Christensen of the hit and run charge if it had been provided with an instruction on the defense of necessity. Indeed, the jury *did* acquit her of the other, more serious charges, apparently believing her version of events over that presented by the state's evidence. CP 43-44. Ms. Christensen was prejudiced by her attorney's unreasonable failure to propose a necessity instruction. *Id.* There is a reasonable probability that counsel's error affected the outcome of her trial. *Jones*, 183 Wn.2d at 339.

Ms. Christensen's defense attorney deprived her of her right to the effective assistance of counsel by unreasonably failing to propose a jury instruction that was necessary to her defense. *Id.*; *Hubert*, 138 Wn. App. at 932; *Powell*, 150 Wn. App. at 156-57. Ms. Christensen's conviction must be reversed. *Id.*

## II. THE TRIAL COURT ERRED BY ORDERING MS. CHRISTENSEN – WHO IS INDIGENT – TO PAY A $200 CRIMINAL FILING FEE.

Ten days before Ms. Christensen's sentencing, the Washington Supreme Court decided in *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), that the amendments to the Legal Financial Obligations (LFO) statutes passed as HB 1783 apply prospectively to all cases pending on direct

appeal. *Ramirez*, 191 Wn.2d at 749-50; RP 369-79.

Pursuant to those amendments, a trial court may no longer impose discretionary LFOs upon indigent persons. RCW 10.01.160(3). Accordingly, a sentencing court may not order an indigent person to pay the discretionary $200 criminal filing fee. Laws of 2018, ch. 269, §§ 1, 18, 7; *Ramirez*, 191 Wn.2d at 747.

Because she is indigent, the sentencing court was prohibited from ordering Ms. Christensen to pay the $200 criminal filing fee.[8] *Id.*; RCW 36.18.020(2)(h). Accordingly, this Court must vacate the order requiring Ms. Christensen to pay that fee. *Id.*

## CONCLUSION

Ms. Christensen was deprived of her constitutional right to the effective assistance of counsel. Defense counsel was ineffective by failing to propose a jury instruction that was critical to Ms. Christensen's defense, without which the jury was left believing that conviction was required even if necessity required Ms. Christensen to flee for her safety. Ms. Christensen's conviction must be reversed.

[8] Apparently in error, the sentencing court checked a box on Ms. Christensen's Judgment and Sentence indicating that she was not indigent. CP 49. But the court also found her indigent for appeal purposes on that same day. CP 61-62. The finding on the Judgment and Sentence is not supported by any evidence and must be vacated.

In the alternative, the sentencing court erred by ordering Ms. Christensen – who is indigent – to pay a $200 filing fee. That order must be stricken from the Judgment and Sentence.

Respectfully submitted on April 11, 2019,

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Clara Christensen
23016 NE Allworth Rd, Unit A
Battleground, WA 98604

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
prosecutor@clark.wa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Seattle, Washington on April 11, 2019.

_____
Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

## LAW OFFICE OF SKYLAR BRETT

## April 11, 2019 - 6:49 PM

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| **Appellate Court Case Title:** | State of Washington, Respondent v. Clara F. Christensen, Appellant |
| **Superior Court Case Number:** | 17-1-02081-8 |

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