

**FILED**

MAY 06 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**NO. 29288-6-III**

**STATE OF WASHINGTON**

**COURT OF APPEALS - DIVISION III**

---

**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**ANTONIO A. PONCE**

**Appellant.**

---

**APPEAL FROM THE SUPERIOR COURT FOR**

**FRANKLIN COUNTY**

**BRIEF OF RESPONDENT**

**SHAWN P. SANT**  
**Prosecuting Attorney**



by: **Timothy E. Dickerson, #32036**  
**Deputy Prosecuting Attorney**

**1016 North Fourth Avenue**  
**Pasco, WA 99301**  
**Phone: (509) 545-3543**

**FILED**

MAY 06 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**NO. 29288-6-III**

**STATE OF WASHINGTON**

**COURT OF APPEALS - DIVISION III**

---

**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**ANTONIO A. PONCE**

**Appellant.**

---

**APPEAL FROM THE SUPERIOR COURT FOR**

**FRANKLIN COUNTY**

**BRIEF OF RESPONDENT**

**SHAWN P. SANT**  
**Prosecuting Attorney**



by: **Timothy E. Dickerson, #32036**  
**Deputy Prosecuting Attorney**

**1016 North Fourth Avenue**  
**Pasco, WA 99301**  
**Phone: (509) 545-3543**

TABLE OF CONTENTS

STATEMENT OF FACTS ..... 1

QUESTIONS PRESENTED ..... 4

**WAS THE DEFENDANT ENTITLED TO A JURY INSTRUCTION THAT A PERSON WHO REASONABLY BELIEVES HE HAS BEEN ADMITTED TO THE PREMISES BY ONE WHO IS AUTHORIZED TO DO SO HAS NOT ENTERED OR REMAINED UNLAWFULLY WHERE THE THERE WAS NO EVIDENCE TO SUPPORT DEFENDANT’S THEORY OF THE CASE AND THE INSTRUCTION WAS A MISSTATEMENT OF THE LAW? ..... 5**

**IF THE DEFENDANT WAS ENTITLED TO SUCH AN INSTRUCTION WAS IT HARMLESS ERROR FOR THE TRIAL COURT TO NOT GIVE IT..... 5**

BRIEF ANSWERS..... 5

**DEFENDANT WAS NOT ENTITLED TO A JURY INSTRUCTION THAT A PERSON WHO REASONABLY BELIEVES HE HAS BEEN ADMITTED TO THE PREMISES BY ONE WHO IS AUTHORIZED TO DO SO HAS NOT ENTERED OR REMAINED UNLAWFULLY WHERE THE THERE WAS NO EVIDENCE TO SUPPORT DEFENDANT’S THEORY OF THE CASE..... 5**

**REFUSAL TO GIVE THE DEFENDANT’S PROPOSED INSTRUCTION WAS HARMLESS ERROR WHERE THE STATE WAS NOT RELIEVED OF ITS BURDEN OF PROOF AND THE VERDICT WOULD HAVE BEEN THE SAME ABSENT THE ERROR..... 5**

ARGUMENT ..... 5

TABLE OF CONTENTS (Continued)

**DEFENDANT WAS NOT ENTITLED TO A JURY INSTRUCTION THAT A PERSON WHO REASONABLY BELIEVES HE HAS BEEN ADMITTED TO THE PREMISES BY ONE WHO IS AUTHORIZED TO DO SO HAS NOT ENTERED OR REMAINED UNLAWFULLY WHERE THERE WAS NO EVIDENCE TO SUPPORT DEFENDANT’S THEORY OF THE CASE AND THE INSTRUCTION WAS A MISSTATEMENT OF THE LAW. ....5**

**REFUSAL TO GIVE THE DEFENDANT’S PROPOSED INSTRUCTION WAS HARMLESS ERROR WHERE THE STATE WAS NOT RELIEVED OF ITS BURDEN OF PROOF AND THE VERDICT WOULD HAVE BEEN THE SAME ABSENT THE ERROR. ....9**

**CONCLUSION .....11**

**TABLE OF AUTHORITIES**

**Cases**

City of Bremerton v. Widell, 146 Wn.2d 561, 51 P.3d 733 (2002) ..7

Neder v. United States, 527 U.S. 1, 15, 119 S.Ct. 1827,  
144 L.Ed.2d 35 (1999)..... 10

State v. Benn, 120 Wash.2d 631, 654, 845 P.2d 289, cert. denied,  
510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993) .....6

State v. Brown, 147 Wash.2d 330, 339, 58 P.3d 889 (2002)..... 10

State v. Coe, 101 Wash.2d 772, 787, 684 P.2d 668 (1984) .....6

State v. Fernandez-Medina, 141 Wash.2d 448, 455,  
6 P.3d 1150 (2000)..... 8

State v. J.P., 130 Wash.App. 887, 125 P.3d 215 (2005) .....7, 8

State v. Jensen, 149 Wash.App. 393, 400, 203 P.3d 393 (2009).... 8

State v. Pirtle, 127 Wash.2d 628, 656, 904 P.2d 245 (1995).....6

State v. Porter, 150 Wash.2d 732, 735, 82 P.3d 234 (2004).....6

State v. Riley, 137 Wash.2d 904, 908 n.1, 909,  
976 P.2d 624 (1999)..... 8

State v. Smith, 131 Wash.2d 258, 265, 930 P.2d 917 (1997).....9

**Statutes**

RCW 9A.52.090 ..... 3, 7, 9

RCW 9A.52.090(1) ..... 8

## STATEMENT OF FACTS

At approximately 8:59 p.m. on a night in November Officer Corey Smith responded to a silent alarm at Llantera Median. (RP 135). Smith parked his car and walked to the north side of the building. (RP 136). He turned on his flashlight and heard a loud clang from inside the shop. (RP 136). He next observed a Hispanic male coming out from the middle of the darkened shop. (RP 136). The Hispanic male squeezed out the door and was placed into custody. (RP 137). While walking to the patrol car the male blurted out that there were three other guys with him and they had left and gone to a nearby house. (RP 138).

Once the scene was secure, Officer Smith identified the person in custody as Antonio Ponce, advised him of his Miranda rights and asked what he was doing there. (RP 139-140). Ponce explained that he was there with two employees to inquire about a car that was for sale. (RP 139). Ponce explained that he had retrieved a phone number from a for sale sign on a Honda car. (RP 139). He told Officer Smith that he met the two employees and another individual at the shop where one of them used keys to open the shop, told him to wait there and then left. (RP 140).

Officer Smith checked the Honda but found no phone number on the for sale sign. (RP 140).

Officer Smith asked Ponce to identify the employees that let him in the shop. Ponce told Smith that Jaime Mendez and Joaquyn Villarela were the employees. (RP 141). Ponce said the other individual carried a handgun and was here illegally. (RP 141). During the conversation Ponce observed a neighbor named Jorge and pointed to him as actually being the one that let him and the others into the shop with a key. (RP 152). Pedro Medina, owner of Llantera Medina, testified that he never employed anyone named Jaime Mendez or Joaquyn Villarela. (RP 225).

Officer Smith observed some wheels and tires just outside the door of the shop and asked Ponce about them. (RP 142). Ponce responded that a friend of his was coming by later to pick them up. (RP 142). Other officers discovered signs of forced entry in the shop. (RP 142).

William Medina, son of Llantera Medina owner Pedro Medina, testified there was only one set of keys to the business and neither he nor Jorge had the key to the shop. (RP 199). Jorge Rodriguez testified that he did not have keys to the shop. (RP 82). Jorge Rodriguez also testified that he never let the defendant into

the shop that night and did not know the defendant. (RP 109). Diana Houck testified that she was with Jorge Rodriguez for the entire afternoon and evening and did not see Jorge go to Llantera Medina or meet with the defendant. (RP 76-77). Pedro Medina testified that he was the only person that possessed keys to the Llantera Medina shop and that he would let only his son take them. (RP 215-216).

At trial, defense counsel proposed a modified pattern jury instruction based upon a statutory defenses to the charge of criminal trespass, pursuant to RCW 9A.52.090. Defense counsel argued that it should be given as a defense to the charge of burglary in the second degree. The proposed instruction read:

A person has not entered or remained unlawfully in a building if the person reasonably believed that the owner of the premises or other person empowered to license access to the premises would have licensed the defendant to enter or remain.

The State has the burden of proving beyond a reasonable doubt that the trespass was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

(CP 148).

In response to the defendant's proposed instruction the State proposed the actual pattern instruction which limited the instruction to the lesser included charge of criminal trespass in the first degree. The instruction read:

It is a defense to a charge of criminal trespass in the first degree that: the defendant reasonably believed that the owner of the premises or other person empowered to license access to the premises would have licensed the defendant to enter ore remain.

The State has the burden of proving beyond a reasonable doubt that the trespass was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

(CP 170).

The trial court gave the State's proposed instruction limited to the lesser included charge of Criminal Trespass in the First Degree. (RP 236).

#### QUESTIONS PRESENTED

- 1. WAS THE DEFENDANT ENTITLED TO A JURY INSTRUCTION THAT A PERSON WHO REASONABLY BELIEVES HE HAS BEEN ADMITTED TO THE PREMISES BY ONE WHO IS AUTHORIZED TO DO SO HAS NOT ENTERED OR REMAINED UNLAWFULLY WHERE THE THERE WAS NO EVIDENCE TO SUPPORT DEFENDANT'S THEORY OF**

**THE CASE AND THE INSTRUCTION WAS A MISSTATEMENT OF THE LAW?**

- 2. IF THE DEFENDANT WAS ENTITLED TO SUCH AN INSTRUCTION WAS IT HARMLESS ERROR FOR THE TRIAL COURT TO NOT GIVE IT.**

BRIEF ANSWERS

- 1. DEFENDANT WAS NOT ENTITLED TO A JURY INSTRUCTION THAT A PERSON WHO REASONABLY BELIEVES HE HAS BEEN ADMITTED TO THE PREMISES BY ONE WHO IS AUTHORIZED TO DO SO HAS NOT ENTERED OR REMAINED UNLAWFULLY WHERE THE THERE WAS NO EVIDENCE TO SUPPORT DEFENDANT'S THEORY OF THE CASE.**
- 2. REFUSAL TO GIVE THE DEFENDANT'S PROPOSED INSTRUCTION WAS HARMLESS ERROR WHERE THE STATE WAS NOT RELIEVED OF ITS BURDEN OF PROOF AND THE VERDICT WOULD HAVE BEEN THE SAME ABSENT THE ERROR.**

ARGUMENT

- 1. DEFENDANT WAS NOT ENTITLED TO A JURY INSTRUCTION THAT A PERSON WHO REASONABLY BELIEVES HE HAS BEEN ADMITTED TO THE PREMISES BY ONE WHO IS AUTHORIZED TO DO SO HAS NOT ENTERED OR REMAINED UNLAWFULLY WHERE THE THERE WAS NO EVIDENCE TO SUPPORT DEFENDANT'S THEORY OF THE CASE AND THE INSTRUCTION WAS A MISSTATEMENT OF THE LAW.**

Defendant argues that it was error for the trial court to deny his instruction regarding a defense to the charge of Burglary in the Second Degree and by doing so he was precluded from arguing his defense. In defendant's Response to Plaintiff's Omnibus Application, his defense is one of general denial. (CP 206-207).

Legal questions, including alleged errors of law in a trial court's jury instructions, are reviewed de novo. State v. Porter, 150 Wash.2d 732, 735, 82 P.3d 234 (2004). The jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. State v. Pirtle, 127 Wash.2d 628, 656, 904 P.2d 245 (1995). The instructions must also state the applicable law correctly; it is an error to give an instruction the evidence does not support. State v. Benn, 120 Wash.2d 631, 654, 845 P.2d 289, cert. denied, 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993). The specific language of an instruction is left to the trial court's discretion, which is reviewed for abuse of discretion. State v. Coe, 101 Wash.2d 772, 787, 684 P.2d 668 (1984).

In defendant's assignment of error, he asks the Court to extend its ruling in State v. J.P., 130 Wash.App. 887, 125 P.3d 215

(2005) regarding the defense of abandonment to the defense that a person was invited or licensed. Defendant cites to City of Bremerton v. Widell. 146 Wn.2d 561, 51 P.3d 733 (2002). In Widell, the Washington Supreme Court explained the effect of RCW 9A.52.090. 146 Wn.2d at 570, 51 P.3d 733. The Court stated that “[s]tatutory defenses to criminal trespass negate the unlawful presence element of criminal trespass,” and “once a defendant has offered some evidence that his or her entry was permissible[,]... the State bears the burden to prove beyond a reasonable doubt that the defendant lacked license to enter. Id.

In J.P., this court determined that Widell permitted a defendant to use an abandonment defense to residential burglary. 130 Wn.App. at 895, 125 P.3d 215. The Court explained that “[c]riminal trespass is a lesser included offense to burglary ...[because] [r]esidential burglary is a criminal trespass with the added element of intent to commit a crime against a person or property therein.” Id. The Court held that because the unlawful entry component of the burglary statute and the criminal trespass statute are the same, the abandonment defense could be used by defendants in burglary cases. Id. The Court did not address the defense of license to enter. In State v. Jensen, 149 Wash.App.

393, 400, 203 P.3d 393 (2009), Division II of the Court of Appeals disagreed with the Court's holding in J.P.. The Jensen court agreed that the ruling in J.P. was appealing however was a result of a misinterpretation of the plain language of RCW 9A.52.090(1), which applies only to the charge of Criminal Trespass in the First Degree. Id. The State urges this Court to reconsider its ruling in J.P. and deny defendant's invitation to extend the statutory defense to a charge of Burglary in the Second Degree.

Additionally, there was no evidence to support giving of the defendant's proposed instruction. All testimony and evidence at trial indicated that the defendant was present in Pedro Medina's shop without permission. Defendant gave different stories to explain his presence, ultimately stating that Jorge Rodriguez had let him into a darkened shop with a key.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. State v. Riley, 137 Wash.2d 904, 908 n.1, 909, 976 P.2d 624 (1999). It is error to submit an issue to the jury that is not warranted by the evidence. State v. Fernandez-Medina, 141 Wash.2d 448, 455, 6 P.3d 1150 (2000). In this case there was not

substantial evidence to support a theory that defendant was invited on the premises. In fact there was no evidence beyond his uncorroborated statement to that effect. It would have been error to give the defendant's instruction to the jury.

Finally, the defendant's proposed instruction is a misstatement of law as found in RCW 9A.52.090. The instruction reads "A person has not entered or remained unlawfully...". The instruction, if applicable to the charge of Burglary in the Second Degree, should have stated that "It is a defense to a charge of Burglary in the Second Degree...". Defendant was not entitled to instruct the jury with a misstatement of the law.

**2. REFUSAL TO GIVE THE DEFENDANT'S PROPOSED INSTRUCTION WAS HARMLESS ERROR WHERE THE STATE WAS NOT RELIEVED OF ITS BURDEN OF PROOF AND THE VERDICT WOULD HAVE BEEN THE SAME ABSENT THE ERROR.**

If the Court finds that the defendant was denied an appropriate instruction by the trial court, the State next argues that any error was harmless.

An instruction that relieves the State of its burden of proving every element of a crime requires automatic reversal. State v. Smith, 131 Wash.2d 258, 265, 930 P.2d 917 (1997). However, not

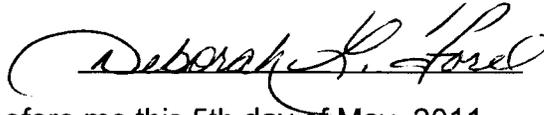
every omission or misstatement in a jury instruction relieves the State of its burden. State v. Brown, 147 Wash.2d 330, 339, 58 P.3d 889 (2002). Where that is the case, reviewing courts will apply a harmless error analysis. Id.

The test for whether a constitutional error is harmless is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Id. (citing Neder v. United States, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). In order to hold an omitted instruction harmless, a reviewing court must examine the record carefully to conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. Id. at 341.

In this case, all evidence, absent the defendant's statement, pointed to him as not having permission to be on the property. The offense occurred in the dark. The only keys to the shop were in the custody of the owner of the shop. Defendant's story was unreasonable and unverifiable. There was clearly evidence that someone forced their way into the shop and was in the process of stealing property. In fact, some property was stolen and not recovered. With or without the instruction in question, the verdict of the jury would have been the same, particularly where the



I hereby certify that on the 5th day of May, 2011 a copy of the foregoing was delivered to Antonio A. Ponce, Appellant, #320168, P. O. Box 777, Monroe WA 98272, and to Janet G. Gemberling, Gemberling & Dooris PS, PO Box 9166, Spokane WA 99209-9166, opposing counsel, by depositing in the mail of the United States of America a properly stamped and addressed envelope.



Signed and sworn to before me this 5th day of May, 2011.



Notary Public in and for  
the State of Washington,  
residing at Pasco  
My appointment expires:  
September 9, 2014

df