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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

OMAR CARLOS,

Appellant.

COA NO. 32407-9-III

SUP. CRT. NO. 13-1-00726-9

APPELLANT'S REPLY BRIEF



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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

I. ISSUES PRESENTED.....1

II. ARGUMENT.....1

 A. MOTION TO CONTINUE TRIAL.....1

 B. INSUFFICIENCY OF EVIDENCE FOR FIRST DEGREE
 BURGLARY.....2

 C. INSUFFICIENCY OF EVIDENCE FOR SECOND DEGREE
 ASSAULT OF A CHILD.....3

 1. Substantial Bodily Harm.....3

 2. Strangulation.....4

 3. Unanimity.....5

 D. INEFFECTIVE ASSISTANCE OF TRIAL
 COUNSEL.....5

 1. Failure to Give an Opening Statement.....5

 2. Failure to object to challenged testimony.....6

 3. Failure to recognize and develop a viable defense theory...7

 4. Sentencing.....9

III. CONCLUSION.....9

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT CASES

In re Personal Restraint Petition of Davis
152 Wn.2d 647
(2004).....5

State v. Jeannotte
133 Wn.2d 847, 851, 947 P.2d 1192
(1997).....9

WASHINGTON COURT OF APPEALS CASES

State v. Ashcraft
71 Wash.App. 444, 455, 859 P.2d 60
(1993).....4

State v. Cordero
284 P.3d 773, 779
(2012).....2

State v. Hovig
149 Wash.App. 1, 5, 13, 202 P.3d 318, review denied,
166 Wash.2d 1020, 217 P.3d 335
(2009).....4

State v. McKague
159 Wn.App. 489, 246 P.3d 558
(2011).....4

STATUTES

RCW 9A.04.110.....4

RCW 9A.52.090.....2, 3, 8

STATE COURT RULES

ER
404(b).....7

I.

ISSUES PRESENTED

In reply to the Brief of Respondent, the Appellant hereby addresses the following issues:

(1) Whether the trial court erred when it denied the defendant's motion to continue trial.

(2) Whether sufficient evidence exists in the record to support the first degree burglary conviction.

(3) Whether sufficient evidence exists in the record to support the second degree assault of a child conviction.

(4) Whether trial counsel's performance was both deficient and prejudicial.

II.

ARGUMENT

A. THE DEFENDANT'S MOTION TO CONTINUE TRIAL SHOULD HAVE BEEN GRANTED BECAUSE THE RECORD SUPPORTS THE CONCLUSION THAT HIS TRIAL COUNSEL WAS NOT READY FOR TRIAL; PROPERLY PREPARED, THE RESULT WOULD HAVE DIFFERED

In support of the above the defendant relies on the arguments below and those contained in his Opening Brief.

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B. THE RECORD IS DEFICIENT OF EVIDENCE SUPPORTING THE JURY'S CONCLUSION THAT THE DEFENDANT WAS GUILTY OF FIRST DEGREE BURGLARY BEYOND A REASONABLE DOUBT

In its response, the State misunderstands the defendant's argument that he had a limited privilege to enter the home to care for his minor children on the date of the offense. The defendant does not maintain that the privilege derived from a prior parenting plan; rather, he maintains that he could enter based on his parental obligation to care for his biological minor children. See State v. Cordero, 284 P.3d 773, 779 (Wash.App.Div.3 2012) and RCW 9A.52.090(3). D.G.'s testimony that the defendant generally did not have permission to enter her home was not relevant to the issue of whether Mr. Carlos reasonably believed that she would have under the circumstances on the evening of November 20. RCW 9A.52.090(3) provides a defense to an actor who, "reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him or her to enter or remain." (Emphasis added). Trial counsel did not offer an instruction consistent with RCW 9A.52.090(3), and the court did not instruct the jury about this defense. If the jury had been instructed about this defense, D.G.'s testimony that the defendant did not have permission to enter the home would not necessarily have been controlling. The jury could have

considered the totality of the circumstances – including the existence of a visitation schedule and how the parents had handled visitations in the past in determining whether or not the defendant could have reasonably concluded that D.G. would have authorized his entry.

The state also argues that the children were “generally old enough to be alone in the house for an hour until somebody could arrive.”

Response at page 15. The maternal grandmother was already late with no explanation. There was no information available about why she was late or when she might arrive. Indeed, the parental grandmother had to come to the house to care for the children after the defendant left. Even after investigators arrived the maternal grandmother still had not arrived.

Finally, the state itself admits in its brief that D.G. did not feel comfortable leaving her children home alone. Response at page 26.

Simply put, the jury should have been asked to consider the statutory defense available in RCW 9A.52.090(3).

C. THE RECORD IS DEFICIENT OF EVIDENCE SUPPORTING THE JURY’S CONCLUSION THAT THE DEFENDANT WAS GUILTY OF SECOND DEGREE ASSAULT OF A CHILD BEYOND A REASONABLE DOUBT

1. Substantial bodily harm

In response to the State’s arguments, the defendant maintains that the seriousness and degree of bruising, lumps, scrapes and cuts sustained

by L.C. do not approach the level suffered by the victims in State v. Hovig, 149 Wash.App., 1,5,13, 202 P.3d 318, review denied, 166 Wash.2d 1020, 217 P.3d 335 (2009); State v. McKague, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011); and State v. Ashcraft, 71 Wn. App. 444, 455, 859 P.2d 60 (1993).

2. Strangulation

The State argues that the conviction is supported by evidence that the defendant obstructed, “even if only partially, L.C.’s ‘ability to breath’”. Response at page 20. However, RCW 9A.04.110(26) provides that “strangulation” means, “to compress a person's neck, thereby *obstructing* the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe”. (Emphasis added). It does not indicate that strangulation occurs when an individual partially obstructs another person’s “ability to breath”, although it does occur if one *intends* but fails to obstruct another’s ability to breath. Based on the record, it does not appear that L.C.’s ability to breath was obstructed because he said he could breathe “okay”. At the same time, the record does not support a conclusion that the defendant intended, but failed to obstruct L.C.’s ability to breath.

Therefore, this alternative means was not proven beyond a reasonable doubt.

3. Unanimity

The defendant reemphasizes his position that if the evidence is insufficient to support either alternative the defendant's conviction for Count 2 must be reversed.

D. TRIAL COUNSEL'S PERFORMANCE WAS BOTH DEFICIENT AND PREJUDICIAL TO THE DEFENSE

1. Failure to Give an Opening Statement

The state argues that no opening was merited because the defendant did not intend to testify and the defense did not intend to call any witnesses. Response at page 23. The state also points out – as did the defendant in his Opening Brief – that trial counsel's decision to waive opening statement generally does not constitute deficient performance. *Id.* However, the State ignores the fact that counsel's decision to waive an opening statement might be deficient where it was not a tactical decision and where it prejudiced the defendant's defense. In re Personal Restraint Petition of Davis, 152 Wn.2d 647, 715 (Wash. 2004).

Here, defense counsel not only waived his opening statement at the beginning of the defendant's trial, he also failed to open after the completion of the State's case in chief. This was an opportunity to outline a defense theory of the case consistent with the evidence that the jury had already heard. The jury would have had the defense theory of the case in

mind while hearing the State's closing argument. The State did not point to any tactical or strategic reason why trial counsel would not have taken the opportunity to outline the defense theory before listening to the State's closing argument. The defendant maintains there was no good reason for doing so. The defendant also maintains that trial counsel's failure to do so was the direct result of failing to develop a viable working theory at all. Defense counsel's failure on this point may or may not be sufficient alone to justify a new trial; either way, the defendant predominantly brings it up now and in his opening brief because it highlights the fact that defense counsel failed to do that which would be expected of competent counsel.

2. Failure to object to challenged testimony

The State argues that trial counsel's failure to object to challenged testimony during trial was not deficient because the defendant failed to show that the court would have granted the objections. Response at page 24. Specifically reference L.C.'s testimony that L.C. "knew something was going to happen," when he heard his father's truck door slam, the state argues that, "the statement did not indicate one way or the other what was about to occur so it was not speculative." *Id.* The defendant simply responds that under the circumstances of the trial testimony that had been elicited at that point in trial the only rationale conclusion that could have been made is that L.C. believed he was about to be assaulted.

The state further argued reference this testimony, that even if the jury might have concluded that L.C. believed he was about to be assaulted, “the testimony probably might have been admissible under ER 404(b) to show L.C.’s knowledge or motive out of fears for reacting the way he did.” Response Brief at 24-25. In response, the defendant points out that L.C.’s “knowledge” or “motive” would have been irrelevant. Only the defendant’s knowledge or motive would be relevant and substantiate the admissibility of evidence of prior bad acts under ER 404(b).

Reference Officer Ledebor’s non-responsive testimony that he took the defendant to jail, the State indicates that even if objectionable it would not have impacted the jury’s determination of guilt. Response at page 25. The State, however, considers this testimony in isolation. The defendant’s argument is that, collectively, trial counsel’s deficient performance compromised the defendant’s ability to receive a fair trial. Taken as a whole and in light of the entire trial, counsel’s performance did prejudice the defendant’s trial to a degree that the outcome would have been different. Officer Ledebor’s testimony was a contributing factor.

3. Failure to recognize and develop a viable defense theory.

The defendant maintains that the overwhelming cause of the trial counsel’s deficient performance was the failure to identify and advocate a

viable defense theory. The failure to do so led directly to trial counsel's decision to waive opening at the start of trial and the decision to completely forgo making an opening statement at the conclusion of the State's case in chief.

The State argues that no evidence supports current counsel's suggestion that trial counsel should have argued that the defendant had a limited license to enter the home to care for minor children. Response at page 26-28. The State is simply wrong: D.G.'s testimony that the defendant was not permitted in her home unless, "invited or asked to go in", in actuality supports the defendant's theory on this point. RCW 9A.52.090(3) provides that the defendant could have lawfully entered if he had a mere "reasonable belief" that D.G. would have authorized entry understanding the circumstances as they existed. The defendant maintains that the jury should have had the opportunity to decide this issue in light of the evidence that was admitted during trial. Trial counsel's failure to offer a jury instruction advising the jury that they could consider the defendant's state of mind on this issue was substantially deficient. Whether or not the couple's children wanted the defendant in the home is irrelevant because they are dependent minors. At best, the children's desire about whether or not they wanted their father in the home would have been a factor that the court should have allowed the jury to consider

in deciding the defendant's reasonable belief about whether or not D.G. would have authorized his entry.

4. Sentencing.

The state argues that counsel's failure to ask for anything other than that the defendant be sentenced at the low end of the sentencing range was commendable and not deficient. Response at page 28. However, if the trial theory currently argued for by the defendant in this appeal is accepted by this court as a viable theory that was not presented by trial counsel, it would be just as viable as a theory justifying a mitigated sentence. This would be true even if it had been unsuccessfully argued at trial. State v. Jeannotte, 133 Wn.2d 847, 851, 947 P.2d 1192 (1997) (A failed defense may still be considered as a basis for an exceptional sentence). Even if this court concludes that counsel's decision not to present this theory at trial constitutes a valid exercise of strategy, it could have been presented at sentencing to argue for a mitigated sentence. Failure to consider it at all was deficient.

III.

CONCLUSION

Based on the foregoing, the Defendant respectfully requests that this court REVERSE and/or DISMISS his convictions for first degree burglary and second degree assault of a child. Furthermore, in the

instance that this maintains one or both convictions, the Defendant respectfully requests that this court REMAND his case to the trial court for resentencing.

DATED this 15th day of April, 2015.

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