

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

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STATE OF WASHINGTON,

Respondent,

v.

DAVID P. ALECK

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
OF KLICKITAT COUNTY, STATE OF WASHINGTON  
Superior Court No. 16-1-00026-8

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BRIEF OF RESPONDENT

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**A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Since the evidence was uncontroverted the Defendant was a convicted felon unable to lawfully possess a firearm, counsel's alleged failure to propose the suggested jury instruction does not affect the jury's determination as to Count 1.
2. Since the evidence was uncontroverted the Defendant was not on open and unclaimed land or ceded land, counsel's alleged failure to propose the suggested jury instruction does not affect the jury's determination as to Count 2.
3. The State is in agreement that there is a scrivener's error on the judgement and sentence that must be remedied.
4. The State will not be seeking appellate costs should it be the substantially prevailing party on appeal.

**B. STATEMENT OF THE CASE**

On January 17, 2015, David Aleck (hereinafter the Defendant) made the decision to hunt deer on the private property of Mr. and Mrs. Ramsay located on Fisher Hill Road in Klickitat County, Washington. 1RP 70. On that date there were no state authorized general hunts of deer and the Defendant did not have a valid Washington State Hunting License. 1RP 68. Prior to entering the property the Defendant was aware this particular piece of land was not on the Yakama Reservation nor an in-lieu site. 1RP 77-79. The Defendant also knew that the land on both sides of the road were fenced with "no trespassing" signs. 1RP 78.

After hearing the shots fired Mr. Ramsay was able see the vehicle the shooter was using from his barn. 1RP 26. Mrs. Ramsay, who also heard the shots fired, was able to obtain the license number of the vehicle involved

and provided that information to law enforcement. 1RP 28, 33. Law enforcement was subsequently able to locate the Defendant who was a passenger in the suspect vehicle being driven by a Sophie Shaddock. 1RP 38. Upon obtaining the consent of Ms. Shaddock, a search of the vehicle revealed the .223 rifle used to shoot the deer. 1RP 40.

When the Defendant was contacted by law enforcement he initially claimed that he saw someone else shoot a deer on Fisher Hill Road but, after being told there were other witnesses, admitted that it was him. 1RP 55. After admitting to his involvement the Defendant yelled, presumably to Ms. Shaddock, to “tell the truth because he did.” 1RP 55. The Defendant then pointed out where the .223 rifle was located in the vehicle, volunteered he was a felon, and said he shot a “buck” deer from the side of the road and not on fenced property.<sup>12</sup> 1RP 56, 78. While the Defendant claimed that he thought he was on ceded land he did not produce tribal ID or claim he was lawfully exercising his treaty rights. 1RP 60-61.

Upon returning to the scene at Fisher Hill Road and locating the dead deer, law enforcement also located three spent .223 caliber shell casings which were placed into evidence. 1RP 42. This is the caliber of the rifle

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<sup>1</sup> The use of a .223 caliber rifle to hunt deer is a violation of WAC 220-414-010 which prohibits the use of a center fire cartridge less than .24 for hunting big game in Washington.

<sup>2</sup> RCW 77.15.460 provides that a person is guilty of unlawful use of a loaded firearm if the person negligently shoots a firearm from, across, or along the maintained portion of a public highway.

used which was subsequently tested and proved to be functioning 1RP 41.

In short, this incident occurred on a public road, off the reservation and not on any in lieu site and, while this may have occurred on ceded land, the property on both sides of the road was privately owned, fenced and clearly posted. Further, the Defendant killed a deer outside of any open hunting season by using a caliber of rifle which is prohibited for the hunting of deer which he fired from a public roadway before fleeing the scene upon observing the property owners, and left the dead deer at the scene, all without asserting any treaty rights to the property owners or making any attempt to harvest the dead deer.<sup>3</sup>

At trial the Defendant testified he knew his mere possession of any firearm was illegal. 1RP 78-79. Rather than assert any alleged treaty right or act on his alleged belief he could lawfully hunt an out of season deer while unlawfully possessing a firearm, the Defendant testified he got “scared” and fled the scene leaving the dead deer behind. 1RP 80-81. The Defendant alleged he was scared “because of the felony, because of the felony and I just know . . .” 1RP 81.

The Defendant was tried and convicted by a jury of Unlawful Possession of a Firearm in the Second Degree, a violation of RCW 9.41.040, and Unlawful Hunting of Big Game in the Second Degree, a violation of

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<sup>3</sup> RCW 77.15.170 provides that it is unlawful to waste wildlife: i.e., kill an animal and not harvest it.

RCW 77.15.410. Specifically, as to Count 1, the jury found that on January 17, 2015, the Defendant was in possession of a firearm after having been convicted of a felony which prohibited him from possessing a firearm. As to Count 2, the jury found that the Defendant hunted for, took, or possessed big game and did not have and possess all required licenses, tags or permits.

### C. ARGUMENT

**1. Since the evidence was uncontroverted the Defendant was a convicted felon unable to lawfully possess a firearm, counsel's alleged failure to propose the suggested jury instruction does not affect the jury's determination as to Count 1.**

The Defendant is asking this court to find that his counsel was ineffective for failure to offer a jury instruction which, he claims, would support his argument that his membership in the Yakama Tribe gives him a treaty right which exempts him from the laws of the State of Washington.

At the outset it should be noted the Defendant has attempted to combine the two charges in his appeal of this matter. While his arguments are entirely concerned with his conviction for Unlawful Hunting, he is seeking reversal of both convictions. The only mention of a firearm is the assertion that Indians are permitted to use modern hunting aids while exercising their treaty rights. BOA 16. The Defendant has cited no authority, nor does any exist, which would justify his possession of a firearm. The Defendant is a convicted felon and forbidden to possess a firearm pursuant to RCW 9.41.040. The Defendant was found to be in possession of a firearm when

he was located by law enforcement and he was in possession of the firearm during and before he was hunting on the Ramsay's property. While one may argue that an Indian may use modern aids while exercising their treaty rights, there is nothing that allows convicted felons to possess a firearm in this state until their right to do so has been restored.

It would defy logic to claim that a convicted felon, who happened to be Native American, could possess a firearm outside of the reservation on the off chance that he may wish to hunt on land he perceives as "open and unclaimed." No case law or statutes support such an assertion. Undoubtedly the Defendant's attorney's was aware of this and therefore did not offer the corresponding jury instruction.

**2. Since the evidence was uncontroverted the Defendant was not on open and unclaimed land or ceded land, counsel's alleged failure to propose the suggested jury instruction does not affect the jury's determination as to Count 2.**

To establish ineffective assistance of counsel, a petitioner must generally show that counsel's representation fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. *In Re Personal Restraint of Yates*, 177 Wn.2d 1, 35, 296 P.3d 872 (2012) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Courts indulge a strong presumption that counsel's conduct was reasonable, and evaluate reasonableness at the time the challenged action was undertaken. *Yates*, 177 Wn.2d at 36.

Conduct that may be characterized as legitimate trial strategy or tactics does not constitute deficient performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Prejudice is a reasonable probability – a probability sufficient to undermine confidence in the outcome – that the result of the proceeding would have differed. *Yates*, 177 Wn.2d at 36.

In general, an Indian going outside of the reservation is subject to nondiscriminatory state laws unless there is express federal law to the contrary. *United States v. Washington*, 520 F.2d 676, 684 (9th Cir. 1975) (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973)). A treaty exemption constitutes such an express federal law. However, the assertion of a treaty right is an affirmative defense that must be pled by the defendant. *State v. Moses*, 79 Wn.2d 104, 110, 483 P.2d 832 (1971). To establish the affirmative defense, the defendant must show by a preponderance of the evidence (1) the existence of the treaty, (2) of which he is a beneficiary, and (3) that, as a matter of law, the treaty bars him from the operation and enforcement of the hunting laws and regulations. *Id.*

The 1855 Treaty with the Yakama Tribe permits hunting on “open and unclaimed lands,” but does not extend to hunting on privately owned lands. *See State v. Chambers*, 81 Wn.2d 929, 934-936, 506 P.2d 311, cert. den., 414 U.S. 1023, 94 S.Ct. 447, 38 L.Ed.2d 314 (1973). At the time of the 1855 treaty, the word “open” as relevant here meant, “[n]ot fenced or obstructed;

as an open road.... Admitting all persons without restraint; free to all comers.” II Noah Webster, *An American Dictionary of the English Language* (1828) (italics in original). To “claim” meant, “[t]o have a right or title to; as, the heir claims the estate by descent; he claims a promise.” I Noah Webster, *An American Dictionary of the English Language* (1828) (italics in original); see also I John Bouvier, *Law Dictionary*, 278 (1874) (A “claim” is the “possession of a settler upon the wild lands of the government of the United States”). These definitions suggest that, to those involved in negotiating and signing the 1855 treaty, open and unclaimed lands were those that were not fenced or obstructed (open) and to which no settler had title or possession (unclaimed).

In *State v. Miller*, 102 Wn.2d 678, 680 n. 2, 689 P.2d 81 (1984), the court held that national forest land is “open and unclaimed” land within the meaning of the treaty. In *State v. Chambers*, 81 Wn.2d 929, 936, 506 P.2d 311 (1973), this court approved a jury instruction defining “open and unclaimed lands” as “lands which are not in private ownership.” These decisions are consistent with those of other jurisdictions interpreting “Stevens Treaties” of which the Yakima Treaty is one. See *State v. Stasso*, 172 Mont. 242, 248, 563 P.2d 562 (1977) (national forest service lands that have not been patented to a private person are open and unclaimed lands within the meaning of a Stevens Treaty); *State v. Arthur*, 74 Idaho 251, 261, 261 P.2d 135 (1953) (the term “open and unclaimed” land as used in a

Stevens Treaty was intended to include and embrace such lands as were not settled and occupied by the whites under possessory rights or patent or otherwise appropriated to private ownership and may include national forest reserve lands); *State v. Coffee*, 97 Idaho 905, 556 P.2d 1185 (1976) (privately-owned land is not open and unclaimed within the meaning of a Stevens Treaty); *Confederated Tribes of Umatilla Indian Reservation v. Maison*, 262 F.Supp. 871 (D. Ore. 1966) (national forests lands considered open and unclaimed under the terms of a Stevens Treaty), *aff'd sub nom; Holcomb v. Confederated Tribes of Umatilla Indian Reservation*, 382 F.2d 1013 (9th Cir. 1967). *See also United States v. Hicks*, 587 F.Supp. 1162, 1165 (1984) (trial court opined that the construction of “open and unclaimed lands” that best accommodates Indian hunting as settlement occurs and matures is that “open and unclaimed lands” include public lands put to uses consistent with an Indian hunting privilege). “Open and unclaimed” lands has been interpreted to mean lands that are publically owned, including national forest service lands, and other lands not settled or privately owned. *State v. Buchanan*, 138 Wn.2d 186, 209, 979 P.2d 374 (1999).

The United States Supreme Court has noted that “[i]t has never been doubted that States may punish crimes committed by Indians, even reservation Indians, outside of Indian country,” including on lands where tribes have reserved hunting and fishing rights. [3] *Organized Village of Kake, et al. v. Egan*, 369 U.S. 60, 75, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962).

*See also Nevada v. Hicks*, 533 U.S. 353, 362, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001) (“It is also well established in our precedent that States have criminal jurisdiction over reservation Indians for crimes committed . . . off the reservation”); *Mescalero Apache Tribe v. Jones*, 411 U.S. at 148-49 (“Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State”).

In light of the above, the Defendant could not have considered the property where he killed the deer in this case to be "open and unclaimed" and there was no evidence adduced at trial to support such a conclusion. The site where the deer was killed was not “open and unclaimed” as that term is used in the 1855 treaty. The land was indisputably owned by the Ramsays – the Ramsays asserted title to the land and fenced, posted and occupied it. Rather than being “[n]ot fenced or obstructed,” the land was fenced, included a home and outbuildings, and was posted with signs. Because the area where defendants killed the deer was not “open and unclaimed” the 1855 treaty between the United States and the Yakama Nation did not permit the Defendant’s conduct.

A trio of decisions from Idaho supports the conclusion regarding the meaning of the phrase “open and unclaimed” in the 1855 treaty. Over half a century ago, in *State v. Arthur*, 74 Idaho 251, 261 P.2d 135 (1953), cert. den., 347 U.S. 937, 74 S.Ct. 627, 98 L.Ed. 1087 (1954), the Idaho

Supreme Court addressed that language in a case involving a Nez Perce member who was prosecuted for killing a deer out of season. The issue on appeal was whether "the defendant, as a member of the Nez Perce tribe, was entitled to hunt wild game on lands ceded by the Nez Perce tribe to the United States by the Treaty of 1855, which lands are now part of the Nez Perce National Forest, during the closed season in disregard of the statutory laws of Idaho." *Id.* at 255. After examining the minutes of the proceedings at the Council of Walla Walla Valley, the *Arthur* court concluded:

It will at once become apparent that the meaning of 'open and unclaimed land', as employed in the treaty, becomes more meaningful. It was intended to include and embrace such lands as were not settled and occupied by the whites under possessory rights or patent or otherwise appropriated to private ownership and was not intended to nor did it exclude lands title to which rested in the federal government, hence the National Forest Reserve upon which the game in question was killed was 'open and unclaimed land.'

*Id.* at 261-262. Because the offense took place in a National Forest, unlike this case, the *Arthur* court ultimately upheld the trial court's dismissal of the criminal prosecution.

The Idaho Supreme Court also addressed this issue in *State v. Coffee*, 97 Idaho 905, 556 P.2d 1185 (1976), in which the court interpreted the "open and unclaimed" wording in the 1855 treaty with the Kootenai Tribe, another "Stevens Treaty." In *Coffee*, the defendant, a member of the Kootenai Indian Tribe, was convicted of killing a deer out of season and with an artificial light. *Id.* at 906. Unlike in *Arthur*, the offense took place

on private land. The court, based on its analysis in *Arthur*, held, “[l]and which is privately owned is not open and unclaimed.” *Id.* at 914. The court affirmed the defendant's convictions.

Most recently, in *State v. Simpson*, 137 Idaho 813, 54 P.3d 456 (2002), cert. den., 538 U.S. 911, 123 S.Ct. 1492, 155 L.Ed.2d 234 (2003), members of the Nez Perce Tribe were charged with possessing an unlawfully taken elk after killing two elk during closed season on private land owned by a timber company that allowed recreational activities on the land. The defendants argued that the “open and unclaimed land” language in the treaty includes privately owned land that is “open” and undeveloped. *Id.* at 814-15. The defendants relied on statements made by Governor Stevens, when explaining the treaty terms to the chiefs. Specifically, Stevens described the treaty as allowing the tribe to hunt on land “not occupied by whites.” *Id.* at 815. Thus, according to the defendants, the land must show “sufficient indicia of occupancy to put a reasonable Indian hunter on notice that it is occupied.” *Id.* at 815. The Idaho Court of Appeals concluded that the former decisions of that court foreclosed the defendants' interpretation, pointing to *Arthur* and *Coffee*. *Simpson* is directly on point and is consistent with the trial court's ruling in this case.

The Montana Supreme Court has adopted the reasoning of *Arthur*, citing both *Arthur* and *Coffee* when stating that “[l]and owned or occupied by private parties is in no way open or unclaimed within the contemplation

of the [Treaty of Hellgate].” *State v. Stasso*, 172 Mont. 242, 247-48, [211 Or.App. 647] 563 P.2d 562 (1977). *See also State v. Chambers*, 81 Wash.2d at 934 (under the Yakima Treaty of 1855, another Stevens Treaty, open and unclaimed lands” does not include “land ... in private ownership [that includes] outward indications of such ownership observable to a reasonable man thus[] preventing entrapment of an unwary Indian hunter” (internal quotation marks omitted)).

In short, all courts that have addressed the “open and unclaimed” wording in the context of offenses committed on private land have concluded that such land is not “open and unclaimed” within the meaning of the various treaties negotiated by Governor Stevens. Privately owned land that shows signs of habitation, which includes buildings, fencing and signs announcing its ownership, is not open and unclaimed. The Defendant was acting outside the scope of the treaty right when he killed the deer and was fully subject to the laws of the State of Washington. Contrary to the Defendant’s arguments, the simple fact is that private property which is fenced and posted and merely bisected by a public roadway cannot be considered “open and unclaimed.”

The Defendant’s claim rests on the theory that by failing to request a jury instruction which was unsupported by the facts, his counsel was ineffective. While the defendant claims in his brief that “...the trial court would have given the affirmative defense jury instruction had it been

requested by defense counsel,” the record in this case shows just the opposite. Brief of Appellant at 8, 19-20. Specifically, as the transcript shows, the Trial Judge indicated his unwillingness to give just the sort of instruction the Defendant is now mistakenly claiming he would have given had it been requested:

WALL: Your Honor, before we go on, I have something that depending on how you rule, but I was thinking last night and it appears to me that we're at a stage in this case where the Defendant has in essence admitted basically everything and there's going to be an argument that because and in essence what that argument boils down to in my mind is jury nullification and they're going to say well, he didn't intend to commit a crime and so if the Court's going to allow that kind of an argument then I'm going to ask for an intent instruction, but I think realistically I don't think that that argument can be made because – because it's not an appropriate application of the law and it's requesting the jury to make a decision based upon assumptions about Treaty rights, seeded land, things that haven't really been flushed out –

JUDGE: I understand.

WALL: Addressed in this case.

JUDGE: I understand your argument. Mr. Lanz?

LANZ: Your Honor, that's of course what we're going to be arguing. That's what we said from the outset. I'm not asking the jury to set aside a law. I'm asking them to interpret it and imply it in this circumstance given these facts and my client's beliefs. That's --- that's what we're going to be arguing, to say that's jury nullification I think is overreaching. Of course the prosecutor wants to kneecap my arguments. That's what they do. We have the right to go ahead and present that argument and live with the jury's verdict.

JUDGE: What you have the right to do, you can be seated if you wish.

LANZ: Thank you.

JUDGE: What you have the right to do is to make the

argument that in your client's opinion those laws exist on his behalf.

LANZ: Correct.

JUDGE: You'll get no jury instruction which sets forth his --- his, what I believe is a misapprehension of his Treaty rights, etc. etc. Otherwise, I wouldn't give you an instruction, but you don't get an instruction you can argue --

LANZ: Correct.

JUDGE: But you can say and it would be best if you preface it at some point, his opinion is, blah, blah, blah and we would allow that no matter what the misapprehension of the Defendant was. If we had a thirty year old in here saying on the stand I thought that I could have consensual sex with a fifteen year old and that that was okay, we would allow the Defendant to make that comment from the stand as his opinion of what the law is, he would never get an instruction to that effect and so forth and so on. A Defendant can always have a misapprehension of the law and express that, that's his rationale for doing it. That doesn't mean he gets a jury instruction. So, I think that clears that up.

2RP 87-89.

While each side may have jury instructions embodying its theory of the case if there is evidence to support that theory, it is error to give an instruction not supported by the evidence. *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289 (1993). In this case there were neither facts nor law which would support the instruction which the Trial Court specifically indicated would not be given. Under these circumstances a failure to request the jury instruction which is now requested cannot be considered ineffective assistance of counsel.

**3. The State is in agreement that there is a scrivener's error on the judgement and sentence that must be remedied.**

The State is in agreement on the issue of the scrivener's error on the

judgement and sentence. The original charging date for this offense was January 15, 2015. CP 205. Subsequently, the information was amended to charge January 17, 2015. The new charging period was reflected in the evidence produced in Court and in the Court's instructions to the Jury. CP 175, 191, 197; 1RP 24-25, 30, 37, 52. Unfortunately, the Defendant's judgment and sentence reflected the original date of offense as January 15, 2015 and not the correct date of January 17, 2015. Under these circumstances the State defers to the Court in constructing the appropriate remedy.

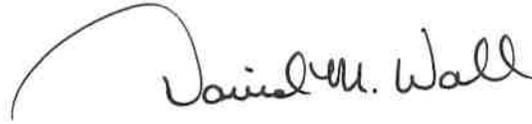
**4. The State will not be seeking appellate costs should it be the substantially prevailing party on appeal.**

Should the State be the substantially prevailing party on appeal, the State will not be seeking appellate costs. The Klickitat County Prosecuting Attorney's Office has a long history with the Defendant and is well aware of his personal and financial circumstances and recognizes he is indigent.

**D. CONCLUSION**

Because it is uncontroverted that the Defendant was unable to lawfully possess a firearm and that he was not on open and unclaimed land, his attorney's failure to propose the suggested jury instructions had no impact on the outcome of his case. Accordingly, the Court should affirm the trial court's ruling. The issue with the scrivener's error may be addressed per the Court's order. No costs on appeal will be sought.

Respectfully submitted this 23rd day of August, 2017.

A handwritten signature in black ink that reads "David M. Wall". The signature is written in a cursive style with a large, sweeping initial "D" that arches over the rest of the name.

DAVID M. WALL  
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Chief Deputy Prosecuting Attorney

**KLICKITAT COUNTY PROSECUTING ATTORNEY**

**August 24, 2017 - 11:45 AM**

**Transmittal Information**

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