

FILED  
Court of Appeals  
Division III  
State of Washington  
7/19/2018 11:14 AM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35907-7-III

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STATE OF WASHINGTON, Respondent,

v.

WALTER BYARD MARTIN, Appellant.

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**APPELLANT'S BRIEF**

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## **I. INTRODUCTION**

The State charged Walter Martin with stealing a bicycle from a friend's home. At trial, the evidence showed that Martin left a note for the friend explaining that he had taken "his" bike and would return it later that evening, and the friend testified that Walter had given him a different bike a couple of years earlier that the friend promised to pay for, but never did. Martin requested an instruction on the good faith claim of title defense, and the trial court refused to give it. A jury acquitted him of the more serious offense of residential burglary and the lesser included offense of criminal trespass, but convicted him of second degree theft. Martin now appeals and alleges that the refusal to give the instruction deprived him of the right to present a defense.

## **II. ASSIGNMENTS OF ERROR**

**ASSIGNMENT OF ERROR NO. 1:** The trial court erred in declining to give Martin's proposed instruction on the defense of good faith claim of title to the theft charge.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**ISSUE NO. 1:** Whether sufficient evidence supported the good faith claim of defense instruction when the jury heard that Martin left a note advising

that he had taken a bike he referred to as his, and that Martin had previously given the owner a different bike that the owner never paid for.

ISSUE NO. 2: Whether the failure to give the good faith claim of title instruction probably affected the trial outcome.

#### **IV. STATEMENT OF THE CASE**

The State charged Walter Martin with aggravated residential burglary and second degree theft of a bicycle. CP 75. At trial, the jury learned that Martin's brother Mike<sup>1</sup> was best friends with William Brown. RP (Kerbs)<sup>2</sup> at 134-35, 175. Over the years, Martin worked with William, and they went hunting, fishing, and bicycle riding together. RP (Kerbs) at 176, 178-79. Around two years previously, Martin had a white Specialized road bicycle that he did not like much, and William expressed interest in acquiring it. RP (Kerbs) at 180, 182. Martin said that he could have it, but after William subsequently sold it, he told Mike that he would

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<sup>1</sup> Because Mike and Walt Martin share a last name, as do William and Candace Brown, only Walt Martin will be referred to by his last name in this brief. Mike Martin, William Brown, and Candace Brown will all be identified by their first names herein for clarity only. No disrespect is intended.

<sup>2</sup> The verbatim reports of proceeding herein consist of two volumes, non-consecutively paginated, containing pretrial proceedings transcribed by Heather Gipson and trial and sentencing proceedings transcribed by Korina Kerbs. This brief will distinguish between the volumes by identifying the court reporter who prepared it, as "RP (Name of Reporter) at (page number)."

pay Martin \$150 for it. RP (Kerbs) at 184. However, the payment never happened. RP (Kerbs) at 185.

Later, in 2016, William purchased a different blue Trek Diamante road bike from a store in Kellogg, Idaho for \$1,900. RP (Kerbs) at 138, 189, 191, 195. The new bike had disc brakes, while the bike Martin had given him had caliper brakes, and the new bike was made of carbon fiber while the old bike was aluminum. RP (Kerbs) at 183, 196. William also added some accessories to the bike after he purchased it. RP (Kerbs) at 197.

At the time of the events leading to the trial, William lived with his wife, Candace, and his uncle, Ronald Wilmot. RP (Kerbs) at 123, 169. Wilmot cannot communicate well and has a poor memory, and Candace was his official caretaker. RP (Kerbs) at 125, 131-32, 171, 173. On the day in question, Candace left Wilmot at home alone while she ran errands, returning home a little after 2:00 p.m. RP (Kerbs) at 138. She saw a note on the coffee table that said:

Billy Tangle Ass, LOL, hey, big brother, this is Walt. But, anyway, Brother Mike has a great job opportunity for me and told me to get out there. Its by state line. Walking so I stopped to grab my bike real quick and will drop it back off when you get home. Thanks, Bill, big brother. See you around eight or seven more like it. Ron seems great. Is

always nice to see him. Might have my phone back on in about an hour, 294-7946. K.

RP (Kerbs) at 139, 141.

Candace also saw that William's bike was gone, so she called him to ask if he had spoken with Martin. RP (Kerbs) at 139, 142. William called Mike and tried to get in touch with Martin but was unsuccessful. RP (Kerbs) at 200-01. He then decided to call the police. RP (Kerbs) at 202. A deputy who responded spoke to Mike about where Martin could be found and located Martin and the bike at the location Mike described. RP (Kerbs) at 235, 237-38. After the deputy arrested Martin, Martin told her that Wilmot had let him inside the house and that the bike was his bike. RP (Kerbs) at 239, 242. He acknowledged leaving the note. RP (Kerbs) at 243. Mike and another defense witness corroborated Martin's story about needing to get to state line about a work opportunity. RP (Kerbs) at 307-09, 312-13.

Martin requested a jury instruction on the "good faith claim of title" defense consistent with Washington Pattern Instruction 19.08. CP 164. He argued that the evidence showed that Martin told witnesses that he thought the bike was his, the note referred to the bike as "my bike," and the testimony supported an inference that both parties owned multiple bikes and Martin mistakenly believed the bike he had taken was the same

one he had earlier given to William. RP (Kerbs) at 344. The trial court refused to give the instruction, concluding that there was insufficient evidence to find a good faith belief that the bike was Martin's. RP (Kerbs) at 347.

The jury acquitted Martin of residential burglary and the lesser included offense of criminal trespass, but convicted him of second degree theft. CP 201-03, RP (Kerbs) at 427. The trial court imposed an exceptional downward sentence of 11 months and ordered Martin to pay the mandatory \$800 legal financial obligations. CP 293, 297, RP (Kerbs) at 468. Martin now appeals, and has been found indigent for that purpose. CP 307, 309.

## V. ARGUMENT

1. When the evidence at trial established that Martin took the bicycle openly and referred to it as "his" bike, and the owner confirmed that Martin had given him a bicycle a couple of years before that he never paid for, Martin was entitled to an instruction on the good faith claim of title defense.

Appellate courts review a trial court's refusal to give a requested jury instruction de novo where the refusal is based on a ruling of law, and for abuse of discretion where the refusal is based on factual reasons. *State*

*v. Ponce*, 166 Wn. App. 409, 412, 269 P.3d 408 (2012) (citing *State v. White*, 137 Wn. App. 227, 230, 152 P.3d 364 (2007)); *State v. Douglas*, 128 Wn. App. 555, 561, 116 P.3d 1012 (2005). Jury instructions are sufficient if substantial evidence supports them, they allow the parties to argue their theories of the case, and when read as a whole, they properly inform the jury of the applicable law. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). It is reversible error to refuse to give a proposed instruction if the instruction properly states the law and the evidence supports it. *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

RCW 9A.56.020(2)(a) establishes that in any prosecution for theft, it is a defense that “[t]he property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable.” The defense negates the essential element of intent to steal, because if the defendant has a good faith subjective belief in his right to possess the property, he cannot be guilty. *State v. Mora*, 110 Wn. App. 850, 855, 43 P.3d 38, *review denied*, 147 Wn.2d 1021 (2002) (citing *Ager*, 128 Wn.2d at 92). The defendant is entitled to an instruction on the defense if there is evidence (1) that the defendant took the property openly and avowedly, and (2) there was some legal or factual basis upon which the defendant based a good faith claim of title to the property taken. *State v. Chase*, 134 Wn. App. 792, 803-04, 142 P.3d 630 (2006), *review denied*,

160 Wn.2d 1022 (2007). When this showing is made, the burden shifts to the State to disprove it beyond a reasonable doubt because the defense negates an essential element of the crime. *State v. Hicks*, 102 Wn.2d 182, 187, 683 P.2d 186 (1984).<sup>3</sup>

In *Hicks*, money belonging to the defendant disappeared from his room, and the defendant accused his friend of taking it. He then took a large sum of money from the friend, believing it to be the money missing from his room. *Hicks*, 102 Wn.2d at 183-84. Because the defendant believed the cash he was taking from his friend was the same cash missing from his room, it was error for the trial court to refuse to give the good faith claim of title instruction. *Id.* at 186-87.

Because the case at hand, as in *Hicks*, presents more than simply a bare assertion of ownership, the instruction should have been given and the jury allowed to sort out the competing arguments about Martin's intent. Here, Martin's reference to "my bike" in the note was substantiated by the prior transaction related by the State's own witness in which Martin gave William a bike, and William promised to pay for it but

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<sup>3</sup> Although the Washington Supreme Court disapproved of the "negation" analysis in *State v. Camara*, 113 Wn.2d 631, 639, 781 P.2d 483 (1989), the Court subsequently overruled *Camara* in *State v. W.R., Jr.*, 181 Wn.2d 757, 769, 336 P.3d 1134 (2014), reaffirming the "negation" analysis.

never did. The history and the reference to “my bike” in the note allow a reasonable inference that Martin simply confused William’s new bike for the Martin’s old bike. Certainly, the jury was not obligated to accept this explanation and could have agreed with the trial court that the two bikes were too dissimilar for Martin to confuse them. However, that decision should have been the jury’s to make, not the trial court’s.

Instructional error is presumed prejudicial, and the State bears the burden of establishing that it is harmless beyond a reasonable doubt. *State v. Rice*, 102 Wn.2d 120, 123, 683 P.2d 199 (1984). Only if there is no reasonable probability that the error affected the verdict will the error be found harmless. *State v. Zwicker*, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986). The State cannot meet that burden here, where the instruction would have squarely placed on its shoulders the burden of disproving Martin’s interpretation beyond a reasonable doubt. A reasonable jury would certainly have questioned why Martin would have left a note confessing to taking the bike at all, and the explanation that he believed it was his was at least as credible as the State’s explanation that he might have feared being identified by Wilmot, who had extremely poor short-term memory and limited ability to communicate. Had the jury been aware that the State had the burden to disprove Martin’s defense, it might well have reached a different verdict.

Because the trial court should have given the good faith claim of title instruction under the facts of this case, and because the failure to give the instruction likely contributed to the verdict, Martin's conviction for second degree theft should be reversed and the case remanded for a new trial.

2. If Martin does not prevail on appeal, the court should decline to impose appellate costs.

Pursuant to this court's General Court Order dated June 10, 2016 and RAP 14.2, appellate costs should not be imposed herein. Martin's report as to continued indigency is filed contemporaneously with this brief. He was previously found indigent for appeal, and the presumption of indigency continues throughout. RAP 15.2(f). He has fully complied with the General Order and remains unable to pay, having no assets or income and substantial debt. A cost award is, therefore, inappropriate.

## **VI. CONCLUSION**

For the foregoing reasons, Martin respectfully requests that the court REVERSE his conviction for second degree theft and REMAND the case for a new trial.

RESPECTFULLY SUBMITTED this 19 day of July, 2018.

A handwritten signature in blue ink, appearing to read "Andrea Burkhart", written over a horizontal line.

ANDREA BURKHART, WSBA #38519  
Attorney for Appellant

## DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

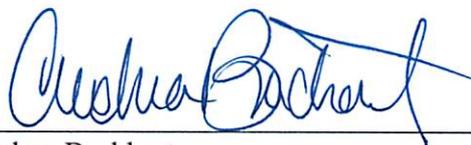
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And, pursuant to prior agreement of the parties, by e-mail to the following:

Brian O'Brien  
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SCPAAppeals@spokanecounty.org

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 19 day of July, 2018 in Walla Walla, Washington.



Andrea Burkhart

**BURKHART & BURKHART, PLLC**

**July 19, 2018 - 11:14 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35907-7  
**Appellate Court Case Title:** State of Washington v. Walter Byard Martin  
**Superior Court Case Number:** 17-1-03063-6

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