

67294-1

67294-1

NO. 67294-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION 1

STATE OF WASHINGTON,

Appellant,

v.

DONALD MOORE,

Respondent

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE SUSAN CRAIGHEAD

BRIEF OF RESPONDENT

JEANNETTE JAMESON
Attorney for Respondent

C/O Prospect Law Group
602 Prospect Ave. N.
Kent, WA 98030
(253)277-2584

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A. RESPONSE TO ISSUES PRESENTED

1. The court correctly applied the Strickland standard in finding "patent ineffective assistance of counsel" in the failure of Moore's attorney in the 2007 trial to assert defense of property. The court decision was not based on a per se test, instead the court correctly found that no reasonably competent attorney would have failed to raise defense of property under the facts and circumstances of Mr. Moore's case. The court found that this was clearly **not** a strategic decision on defense counsel's part, but that the record showed counsel to be unaware of the defense. No reasonable trial strategy would have ignored defense of property as an integral part of any use of force defense in this case. In addition, the court determined that the but for the failure of counsel to raise the defense, the outcome of the trial could have been different , and this determination was solidly based upon the trial record.

2. The court correctly found that Mr. Moore's Sixth Amendment rights were violated in admitting the former testimony of the State's main witness because defense counsel was incompetent in prior cross examination of the witness. The court found that defense counsel's failure to cross examine on elements of an obvious,

appropriate and viable affirmative defense was due to the fact that counsel was completely unaware of the defense, which was evident from both the cross examination and in closing argument of counsel at trial. The court therefore correctly held that the prior opportunity to cross examine was inadequate to satisfy the Confrontation Clause.

3. Under ER 804(b)(1) the court properly held that the former testimony of the unavailable witness was not admissible because counsel at the first trial lacked a similar motive to develop cross examination due to counsel's lack of competency, knowledge and understanding of the elements of the defenses available to Mr. Moore which were obviously raised by the facts of the case. The affirmative defense required proof of additional facts rather than simply negating elements of the charge, and cross examination that addressed only general credibility and self defense issue was not based on a similar motive.

B. STATEMENT OF THE CASE

1. Procedural Facts.

The Respondent concurs with the Appellant's statement of procedural facts except for the following additions:

Following the guilty verdict in the original trial, Moore appealed on ineffective assistance of counsel "for failing to propose

basic instructions that defendant need not be in actual danger of injury or offense, that he had no duty to retreat and that he had a right to defend his property as well as himself". See Appendix E. Counsel noted "these instructions were all necessary to competently present a lawful use of force defense in this case. The failure to competently execute the selected strategy falls below the standard for competent representation sufficient to cure the prejudice." See Appendix E. Although the court in deciding the initial RALJ appeal cited the failure to raise the "no duty to retreat" instruction as the basis for reversal, no detailed findings of fact or conclusions of law were entered, nor would it have been necessary to reach the additional deficiency as remand and retrial would normally remedy both. See Appendix A (to Appellant's brief).

2. SUBSTANTIVE FACTS

Donald Moore was charged with Assault in the Fourth Degree over a fight with tow truck driver Mark Storer arising from a struggle for possession of Moore's car. Storer testified in the original trial that he arrived at the private parking lot where the car was parked, and was making initial preparations to tow the car, stating: "I backed up to the side of it...put the chain on the front of it and I was going to turn the car around, get it out of the parking space. (unintelligible) effort,

not having to put dollies on the car." 1RP 24. Storer testified that Moore came out, yelling, saying "don't tow my car" and Storer told him "I have to tow your car. They told me to tow your car, I'm towing your car." 1 RP 24.

Storer then stated "Um, from there he started, I'm hooking chain off the vehicle and he had my j-hook, the attaching hook in his hand and I grabbed it from him, took it away from him, and I said "Don't touch my equipment." And he said, "Don't touch my car." I went back and put it on the car again. 1 RP 24. "From there he reached back underneath the car to take it off the car and uh, I pushed his hand away..." Id.

Storer testified that Moore took the chain or hook off the car; that Storer grabbed it away and put it back on; that Moore tried to take it back off; that Storer pushed his hand away; that Moore struck Storer in the face with a closed fist. 1 RP 24-25. Storer claimed he tried to use his cell phone and that Moore slapped it out of his hand, that while Storer searched for his phone Moore climbed into the cab of the tow truck and locked the doors, that a woman arrived at the scene and Moore called out to her to drive his car away for him. 1 RP 25. Storer claimed that he continued to try to hook the chain on the

car and that Moore then kicked him, grabbed the loose end of the chain, wrapped it around the mirror of his car, put the rest of the chain in the car and again told the woman to drive the car away. 1 RP 25. Storer indicated that he did something to raise the wheel of the car to prevent it from being driven away and that Moore then hit him several times and tried to use the controls of the tow truck to lower the car back down. 1 RP 25-26.

Moore testified at the original trial that he was at the Garden Point Apartments talking to his father-in-law, having just spent two days in the hospital ICU with his baby son who had been born six weeks premature. 1 RP 60. Moore heard a diesel engine outside and looked out to see a tow truck backing up to his car. Id. He went outside and the driver was "pulling two chains around the front end of my car." Id. He stated that he showed the driver the hospital bracelet on his wrist and said "Please don't tow my rig. I'll move it. I'll move it." Id. Moore testified that he even told the driver that the birth certificate to his son was in the backseat, but that the driver just looked at him and said "I don't give a fuck. I'm taking it anyways." 1 RP 61. At that point the driver "hooked the hookup suspension."

Moore testified that after the driver put the hook on the car he knelt down and took it off, but that the driver jumped on his back, knocking him off balance, and stood over him with the other hook in his hand. 1 RP 61. Moore felt that the driver was going to hit him with the hook so he hit him back. Id. The driver then went around the car and hooked the other hook to the suspension on that side. Id. Moore followed him and unhooked the other hook and the driver hit him again. Id. Moore hit him back again. Id.

Moore testified that he kept asking Storer to stop, that he kept asking "Why are you doing this?" 1 RP 62. Moore stated "...what was going on didn't have to happen. He could have stopped hooking things to my car and, I didn't want to fight with him, but I was trying to get my car unhooked. Could have just stopped. Could have waited for the police. It didn't have to go on like that." 1 RP 62. As the incident continued to escalate, Moore stated that his intention in striking Storer was "Just to make him stop." At one point Moore and Storer struggled over the controls to the tow truck and Storer ran something under the front end of the car and lifted it up by the "nose of my car". 1 RP 63. Moore turned off the truck and locked it so that the position of the car would remain the same until the police came and could see

it. Id. Moore went over to Storer again and Storer grabbed him, ripping his jacket. Moore grabbed Storer by the lapels, and Storer said "Okay. Let's stop" and Moore let him go and walked 20 feet away to wait for the police. Id.

In cross examination the prosecutor asked why Moore did not let the driver take the car and just get it out of impound, and Moore stated that it was an illegal tow. 1 RP 65. The prosecutor asked why Moore did not just walk away and Moore stated "Because he's stealing my vehicle. The man assaulted me and stole my vehicle." Id. The prosecutor asked: "So you were protecting your vehicle? You were defending your vehicle?" and Moore answered that he was defending "my body and my property." Id. The prosecutor asked Moore if he felt he was defending himself when he kept removing the equipment from the car and Moore stated: "...when I asked to move my car, it's my legal right to move my car, Washington State Patrol. That's the rule. When he put the hook on my car and I went to remove it after asking him to move my car, then he was stealing my car." 1 RP 67.

Moore clearly stated that Storer placed the hook on the car after Moore had asked to move the car. Id. The prosecutor pointed out that Storer had a tow truck, was wearing a tow truck driver's outfit

and told Moore that he had been told to tow the car. Moore stated that it "wasn't a police impound." 1 RP 69. Moore stated that Storer hit him first, and that Storer's intention was to get the hook on the car so that it would look like a legal tow when it wasn't. Id. Moore stated again that he was defending both himself and his property. Id. The prosecutor then asked about Moore's intention in going inside the tow truck pointing out that this would not have been an action that Moore would have taken to defend himself. 1 RP 70. Moore stated that car had been lifted by "the nose" of the car, not the frame or a tire, and that it was bending the car. Id. Moore also indicated he was concerned for his son's birth certificate in the back seat "that I could never replace." Id.

At the first trial, apartment manager Seneca Robben testified only that she saw Moore punch Storer in the face as Storer was trying to tie a strap to Moore's car, that she did not see more than two seconds of the incident and that she went back in her office to call the police. 1 RP 35-39. At the second trial Robben expanded her testimony significantly, stating that she was "walking the property" and saw the altercation. 2 RP 107. She said that after she called 911 she went back outside until police arrived. 2 RP 109. She testified that

she was the person who called the tow truck at 8:00 that morning after noticing that it had been parked in the wrong space and without a guest pass. 2 RP 107. She testified that a guest pass is required to park in any space other than those designated for visitors. 2RP 120. She testified that Moore's car was parked in a space designated for tenants only and that signs were posted around different parts of the building, although she could not recall whether any signs would be visible from the place where the Moore car was parked. 2 RP 121. She testified that Moore was aware of the parking rules and that she had personally informed him of the rules two weeks earlier when she had the same or a different car belonging to him towed by the same tow company. 2 RP 123.

At the second trial Moore testified additionally regarding the parking issue, indicating that he parked in the same place where he always parked while visiting his father-in-law and that he had parked there 60-70 times in the past, had never been told he could not park there, that there were no signs or stickers around the apartment regarding a guest pass and that he had never met Robben and never had a car towed before. 2 RP 139-140. He testified again that when he noticed the tow truck and went to his car that Storer was only

dragging the chains around toward the front of the car and that nothing was attached to his car. 2 RP 141.

In closing argument for the first trial the prosecutor argued that Moore "could not claim self defense of property...You can't, see I'm hitting this guy because I'm trying to protect my car. It has to be about him. It has to be about his safety.....Is that somebody who's defending themselves? Is it more about the car or was it about him?". 1 RP, Vol 2, 2. Defense counsel for the first trial failed to object to the argument, failed to propose jury instructions consistent with the defendant's testimony, and completely ignored the defense of property issue. Contrary to the testimony of both Moore and Storer she instead argued that the car was merely "periphery" to the fight. 1 RP, Vol 2, 6. In closing argument for the second trial, the State highlighted the jury instruction regarding malice, stating; "Malice or maliciously means an evil intent, wish or design to vex, annoy or injure another person. Malice is not required to be inferred from an act done in willful disregard of the rights of another. Mark Storer was not acting maliciously when he arrived to do a lawful tow of a vehicle at the Garden Point Apartments." 2 RP 182.

C. ARGUMENT

The Superior court held that the failure of Moore's 2007 trial counsel to raise and develop cross examination relating to the defense of property in a case that revolved around a fight for possession of Moore's car was "patent ineffective assistance of counsel" and that cross examination was affected in a fundamental way by counsel's lack of competence. This finding was correctly made where the defendant stated repeatedly throughout his testimony that he was acting to protect both his property and himself from what he believed to be an illegal tow, tantamount to stealing his car.

Trial counsel's cross examination of Storer was devoid of even a single question regarding the manner in which Storer was attempting to take possession of Moore's vehicle. It was devoid of any questioning regarding the possibility that Storer heard Moore call out that he would move the car before Storer attached anything to the car. It was devoid of any questioning regarding the steps that would have been required to place the car under tow. Moore's counsel failed to note or raise any further question regarding Storer's testimony that "... I was going to turn the car around, get it out of the parking space. (unintelligible) effort, not having to put dollies on the car." 1RP 24. This testimony was consistent with Moore's stated concerns that the

manner in which Storer was attempting to take possession of the car had the potential of causing irreparable damage to the property. Trial counsel also ignored the testimony of Robben, which at the first trial was consistent with Moore's testimony in that Robben testified she saw Moore hit Storer as Storer was squatting down attempting to tie a strap to the car. Robben did not testify that she saw any tow equipment actually attached to the car.

In the retrial of Moore's case the prosecutor did in fact introduce new evidence to circumvent Moore's defense of property claim, through the testimony of Robben regarding the parking rules, signs, and guest passes for the private parking lot. 2 RP 119-120. Robben testified in the retrial that she had called for the tow and signed an authorization. *Id.* In addition, Robben claimed for the first time that Moore's vehicle had been towed two weeks prior to this incident, by the same towing company, and that she personally informed Moore of the parking rules at that time. 2 RP 123. Cross examination of Storer was devoid of questioning regarding prior towing, prior contact with Moore, or the authorization for the tow.

The Superior court property applied the Strickland standard in finding the admission of Storer's testimony denied Moore of his rights

under the Confrontation Clause and was also erroneous under ER 804(b)(1). The prosecutor repeatedly argued in closing that Moore had no right to use force in defense of his property, but only in defense of himself. Moore's counsel not only let this argument stand, she conceded the point, stating that the car was "periphery". The Superior court correctly applied Strickland in holding that but for the failure of Moore's counsel the outcome of the trial could have been different.

1. THE SUPERIOR COURT PROPERLY APPLIED STRICKLAND IN FINDING MOORE RECEIVED "PATENT INEFFECTIVE ASSISTANCE OF COUNSEL " IN THE ORIGINAL TRIAL, AND THAT THE OUTCOME OF THE TRIAL WAS POTENTIALLY AFFECTED BY COUNSEL'S DEFICIENT PERFORMANCE.

Appellant ignores the trial record in arguing that Moore's trial counsel "strategically" focused on the "more credible" affirmative defense of self defense because it was supported by the evidence. Contrary to the assertion that this case was merely one of "...Moore, repeatedly punching a tow truck driver in the face..." the trial testimony told the story of a struggle for lawful possession of Moore's car, which escalated to a struggle for possession of the towing hooks and tow truck controls, finally culminating in a mutual exchange of blows. Moore repeatedly stated in response to cross examination as

well as in his direct testimony that he was defending both his car and himself from what he believed to be unlawful action by Storer. 1 RP 65; 1 RP 67; 1 RP 68; 1 RP 69; 1 RP 70; 1 RP 71; 1 RP 73 ("I felt that he was stealing my vehicle and assaulting me in the process. That's how I felt").

The law on defense of property, stated simply, is that reasonable force may be exercised to prevent one without privilege from trespassing. Peasley v. Puget Sound Tug & Barge Co., 13 Wn.2d 485, 506, 125 P.2d 681 (1942). Use of force is lawful when used by a party in preventing or attempting to prevent . . . a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession so long as the force is not more than is necessary. RCW 9A.16.020(3).

Even with the complete failure of Moore's trial counsel to cross examine Storer on the issue, there was some evidence at trial to raise the question of malicious trespass and malicious interference with Moore's car by Storer. Moore testified that Storer stated "I don't give a fuck. I'm taking it anyways" when Moore indicated he would move his car. 1 RP 61. Moore testified that Storer was hoisting the car improperly and applying hooks to the car in a manner that was

potentially damaging to the car. 1 RP 62-63. Moore testified that Storer put the first hook on after Moore indicated he would move the car, and that his intention was to make it look like a legal tow when it was not. 1 RP 69. Moore testified that Storer attacked him, and Storer even admitted that he was the first to make physical contact by pushing Moore. 1 RP 24-25; 61.

The Sixth Amendment right to counsel necessarily includes the right to effective assistance of counsel, and it is a violation of constitutional magnitude for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence. Johns v. Perini, 440 F.2d 577, 579 (6th Cir. 1971); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); King v. Beto, 429 F.2d 221, 225 (5th Cir. 1970), cert. denied, 401 U.S. 936, 91 S.Ct. 921, 28 L.Ed.2d 216 (1971); Chalk v. Beto, 429 F.2d 225, 227 (5th Cir. 1970). Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). This was not a case where

the defendant was required to choose either self-defense or defense of property--both affirmative defenses were compatible, both were amply supported by sufficient evidence at trial, and both were necessary to competently present a lawful use of force defense in this case.

Moore's counsel was previously determined incompetent by the Superior Court in the first RALJ appeal, unchallenged by the State. See, Appendix A to Brief of Appellant. The failure to propose a "no duty to retreat" instruction was only one part of the incompetent performance by defense counsel in presenting Moore's defense of lawful use of force. The failure to argue defense of property was also raised in the initial appeal but not reached by the court, most likely because the jury instruction issue was sufficient alone to warrant reversal, and the court would have been unaware that the victim would be unavailable at retrial and that the prejudice from the prior deficient performance could not, therefore, be cured.

Appellant asserts that this court should find that trial counsel's ignorance of defense of property in favor of self defense alone was a legitimate trial strategy or tactic. To obtain a jury instruction on self-defense or on defense of property, there must be some credible

evidence tending to establish that the defendant acted in self defense or acted in defense of property. State v. Graves, 97 Wn. App. 55, 61-62, 982 P.2d 627 (1999); State v. Dyson, 90 Wn. App. 433, 438, 952 P.2d 1097 (1997). Whether the use of force used in the defense of property is greater than is justified by the existing circumstances is a question of fact for the jury to determine under proper instructions. See Peasley v. Puget Sound Tug & Barge Co., 13 Wn. 2d 485, 506, 125 P.2d 681 (1942) ("It is the generally accepted rule that a person owning, or lawfully in possession of, property may use such force as is reasonably necessary under the circumstances in order to protect that property, and for the exertion of such force he is not liable either criminally or civilly.")

Trial counsel's failed attempt to present a lawful use of force defense on Moore's behalf while ignoring defense of property was not conceivably attributable to a legitimate trial tactic. The Superior court recognized this in holding that no competent counsel would have failed to include defense of property as a part of a lawful use of force defense in this case, and that counsel could only have failed to present the defense because counsel was unaware of the defense.

Trial testimony amply supported a defense of property instruction in this matter. Storer testified that he had just arrived and had barely begun making preparations to tow Moore's car when Moore came running up and indicated that he would move the car. Storer testified that he had placed one hook on the car at this point. 1 RP 24. Moore testified similarly that the truck had just pulled up and that Storer was dragging the chains around toward the front of the car, but Moore stated that nothing was attached yet. 1 RP 60-61.

Any "reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees" would have believed he had a right to move his car voluntarily before any towing equipment was attached. State v. Janes, 121 Wn 2d 220, 238, 850 P. 2d 495 (1993). Robben also testified that what she saw (during the few seconds she was observing) was Moore strike Storer as Storer was squatting down trying to put a strap on the car. 1 RP 36-37. Moore testified that he believed he had a legal right to move his car prior to it being towed, and that Storer's continuing the process of preparing to tow the car after Moore requested to move it was tantamount to stealing the car. 1 RP 67; 1 RP 69.

There is also ample evidence that Moore was prejudiced by his counsel's lack of awareness of the elements necessary to present the appropriate defenses in his case. The prosecutor argued in closing, without objection, that Moore was not legally entitled to use force in defense of his property, that he was only permitted to act in defense of his person. 1 RP Vol. 2, 2. The prosecutor argued "Even if he was stealing the car does this give the defendant a right to hit him or should he have called the police, and say look, this guy's doing an unlawful tow." Id. The prosecutor ended by asking the jury to "...find the defendant guilty, hold him accountable flying off the handle because his car was going to get towed." 1 RP. Vol 2, 3.

Focusing solely on self defense in closing, defense counsel argued that Moore "...felt like his force was being used against him. He had to react to defend himself...Mr. Storer came at him. Mr. Storer hit him...he was worried about his physical safety, That he had to use that minimal amount of force to back Mr. Storer off him. ... The car is periphery." 1 RP. Vol 2, 5-6. In rebuttal the State argued "...it does not look necessary to hit somebody while they're (unclear) doing what, chaining the car. And he wants you to believe that his car was secondary but he didn't jump in the car cause he's afraid of his safety.

He told you that. He was in there trying to think of how to stop his car from being taken." 1 RP. Vol 2, 6-7. The State also argued "Mark Storer was doing his job. He had the right to protect his livelihood, his truck." 1 RP. Vol 2, 7.

Moore demonstrated to the Superior court that he was entitled to a defense of property instruction, that his counsel's performance was deficient in failing to request it, that this failure was not a legitimate trial tactic, and that it resulted in prejudice. Appellant argues that there was no credible evidence that Storer was committing a trespass or interference with Moore's vehicle "that was illegally parked", however Moore testified at trial that he ran to his car indicating that he would move the car before any tow equipment was attached, and that the initial struggle to attach the first hook was because Storer was trying to make it look like the tow was legal when it was not. 1 RP 69. Further evidence of malice or trespass could have been, but was not developed through cross examination of Storer. Storer was never confronted as to these issues because trial counsel was unaware of the elements necessary to present lawful use of force in defense of property as an affirmative defense.

Under both the performance and the prejudice prongs of Strickland, the Superior court properly found that trial counsel's performance was deficient and that Moore was prejudiced as a result. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The court properly considered the entire record of the trial, including the direct and cross examination of Storer and Moore, the jury instructions, and the closing argument of trial counsel in making this determination. State v. McFarland, 127 Wn. 2d 322, 335, 889 P.2d 1251 (1995).

2. PRIOR CROSS EXAMINATION OF AN UNAVAILABLE WITNESS BY AN ATTORNEY WHO IS INCOMPETENT AND UNAWARE OF THE ELEMENTS OF A LAWFUL USE OF FORCE AFFIRMATIVE DEFENSE DOES NOT SATISFY THE CONFRONTATION CLAUSE IN A CASE REVOLVING AROUND THE DEFENSE OF PROPERTY.

"In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him. U.S. CONST. amend VI. Similarly, article 1, section 22 of the Washington State Constitution states that "[in criminal prosecutions the accused shall have the right to . . . meet the witnesses against him face to face". Const. art. 1, § 22 (amend. 10). Although the state constitutional provision arguably gives broader protection than its federal counterpart, our courts have not so interpreted it. State v. Palomo,

113 Wn.2d 789, 794, 783 P.2d 575 (1989), cert. denied, 111 S. Ct. 80 (1990). The Confrontation Clause prohibits admission of testimonial statements made out of court by a witness who is unavailable for trial unless there has been a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L. Ed. 177 (2004). Although a trial court's decision to admit evidence is reviewed for abuse of discretion, [State v. Neal, 144 Wn. 2d 600, 609; 30 P.3d 1255 (2001)] the question of whether a trial court has violated an accused person's confrontation rights is an issue reviewed de novo. State v. Medina, 122 Wn. App 40, 48, 48 P.3d 1005 (2002). The Confrontation Clause guarantees both the right to face those who testify, before the trier of fact, and the right to conduct cross examination. Coy v. Iowa, 487 U.S. 1012, 1016, 108 S.Ct. 2798 (1987); State v. Hobson, 61 Wn. App. 330, 334, 810 P.2d 70 (1991).

Confrontation is generally satisfied when a witness has given testimony at a previous judicial proceeding against the same defendant and was subject to cross examination at such proceeding. Barber v. Page, 390 U.S. 719, 722, 88 S. Ct. 1318, 20 L. Ed. 255 (1968). The former testimony exception to the hearsay rule, ER 804(b)(1), is

designed to protect confrontation interests while permitting the admission of reliable evidence.

A defendant has a right to cross-examine the State's witness concerning possible self-interest in cooperating with the authorities. State v. Robbins, 35 Wn. 2d 389, 213 P.2d 310 (1950). Further, the court may violate the confrontation clause if it prevents the defense from placing facts before the jury from which such bias or prejudice may be inferred. Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974); State v. Brooks, 25 Wn. App 550, 611 P.2d 1274 (1980). In Davis the defense sought to question a key prosecution witness concerning the fact that he was on probation as a juvenile offender and thus could be under pressure from the police. The trial court disallowed this cross-examination to protect the secrecy of the juvenile record. The Supreme Court reversed, holding that defendant's Sixth Amendment right was violated as he was unable to establish the factual record necessary to argue his bias theory.

In the instant case the defendant was also unable to cross-examine the witness concerning the reasons for his possible bias, his motive for pushing forward with the impoundment of the defendant's car despite the defendant being present and requesting to move the

car, and the arguably malicious manner in which the car was being placed under tow. The incompetence of trial counsel was at fault in this matter, rather than the court denying competent counsel the right to question on these issues, however the violation of the defendant's confrontation rights occurred regardless of whether the error was on the part of the court or that of incompetent trial counsel.

Where a defendant was given an opportunity to question a witness at a prior proceeding but was unrepresented by counsel and not competent to proceed pro se, the defendant's confrontation clause rights were violated and admission of the prior testimony was error. In re Pettit v. Rhay, 62 Wn.2d 515, 383 P.2d 889 (1963). The court in Pettit v. Rhay noted that the confrontation right would be a "shallow right indeed" if a mere opportunity to cross examine without any competence to actually do so were to suffice. Id.

Nor do the cases cited by the Appellant such as State v. Jenkins, 53 Wn.App. 228, 766 P.2d 499, rev. denied, 112 Wn.2d 1016 (1989), and State v. Mohamed, 132 Wn.App. 58, 130 P.3d 401 (2006) by any means stand for the proposition that incompetent cross examination or the mere opportunity for cross examination by an incompetent

attorney will automatically satisfy the Confrontation clause.¹ These cases did not involve incompetent counsel, rather they involved strategic choices made by competent counsel. In Mohamed, in fact, this court noted that the defendant "...was able to elicit from York testimony that rebutted, point by point and in every detail, the version of events presented by her 911 call - just as he would have been able to do if she had testified at trial..." and that the testimony (a complete recantation of the charged assault) was extremely favorable to the defendant. Mohamed, 132 Wn.App at 64.

Moore was deprived of a substantial defense by his counsel's ignorance of the law relating to lawful use of force. Moore's trial counsel completely conceded defense of property, did not object to the State's argument that Moore had no right to defense of property, undermined Moore's repeated testimony that he was protecting both his property and himself, and let the State's final plea to the jury,

¹ The State erroneously cites a case in the Appellant's brief as: State v. Benn, 161 Wn.2d 256, 165 P.3d 1232 (2007) claiming that this case held that confrontation was satisfied where the defendant and his attorney waived cross examination of a State witness who died before the case could be retried. At 161 Wn.2d 256 is a case entitled State v. Bennett, which contains no holding on confrontation. The slip opinion on State v. Benn, No. 78094-3 (August 23, 2007) did contain a discussion about confrontation of a State's witness who died, noting that "At the heart of Benn's argument is his claim that Thoenig [Benn's attorney] was ineffective...not properly before us...in fact the Supreme Court has already decided that counsel effectively represented Benn in the first trial..." citing In re the Personal Restraint of Benn, 134 Wn.2d at 894 (bracketed material added). This slip opinion was later published in State v. Benn, 130 Wn. App. 308, 123 P.3d 485 (2005) with the portion of the opinion relating to the confrontation issue **unpublished**. The Benn case is not properly cited by the State and does not stand for the proposition that the State claims.

"...find the defendant guilty, hold him accountable flying off the handle because his car was going to get towed", go unchallenged . 1 RP. Vol2, 3.

No lawyer with "ordinary training and skill in the criminal law" acting conscientiously to protect his client's interest would have failed to raise defense of property in this case Glasser v. United States, 315 U.S. 60, at 62. As noted by the State in this matter, the Confrontation Clause requires that prior testimony be admitted only where the witness has testified under circumstances that include representation of the defendant by counsel. Although failure to raise an available defense does not constitute ineffective assistance of counsel where such defense is incompatible with another defense raised at trial, State v. Woo Won Choi, 55 Wn App 895, 781 P.2d 505 (1989), there was no incompatibility between defense of property and self defense in Moore's case.

Because Moore was not represented by competent counsel at the time of Storer's prior testimony, the Superior court was correct in holding that Moore's right to confrontation was denied when the testimony was admitted at retrial of Moore's case.

3. THE SUPERIOR COURT CORRECTLY HELD THAT THE DISTRICT COURT ERRED IN ADMITTING STORER'S FORMER TESTIMONY UNDER ER 804(b)(1)

When a witness is not available, ER 804(b)(1) permits the introduction of that witness' former testimony at a subsequent hearing only when the party against whom the statement will be offered had an opportunity to examine the witness and had a similar motive to develop the testimony as in the current proceeding. The former testimony exception to the hearsay rule is designed to protect confrontation interests while permitting the admission of reliable evidence. Although an out-of-court statement may meet the requirements for a hearsay exception under ER 804, it is only admissible against an accused if it satisfies confrontation clause concerns. Palomo, 113 Wn. 2d 789, 794.

ER 804(b)(1) requires that both of the rule's elements be satisfied, including the requirement that the party had a similar motive to develop the testimony in the two proceedings. State v. DeSantiago, 149 Wn2d 402, 407, 68 P.3d 1065 (2003). As argued above, the opportunity to examine the witness in this case should be found deficient under ER 804(b)(1) because Moore was not represented by competent counsel at the time. As to the similar

motive requirement, Moore's counsel at the original trial focused solely on self defense and appeared to have no awareness that defense of property was not only an available defense but was of critical importance under the facts of the case. Counsel asked multiple detailed questions regarding the fight between Moore and Storer, such as who touched whom first, who hit first. But there was no questioning whatsoever regarding defense of property. No questions were asked to clarify the physical actions with regard to the tow, such as what chains or straps were in use at critical points, where and when those chains or straps were placed. No questions were asked regarding actions taken by Storer to block Moore from removing his car from the parking space. No questions were asked regarding potential damage to Moore's car from the manner in which Storer was attempting to take control over it. No questions were asked regarding Storer's profit motive in completing the tow, his arrangements with the property managers, which (if any) managers he had contact with that morning, whether any other cars were towed that day, and whether any car belonging to Moore had been previously towed.

Cases addressing the similar motive requirement of ER 804(b)(1) make it clear that whether or not a party had a similar

motive to cross examine is fact specific and must be evaluated on a case-by-case basis. Young v. Key Pharmaceuticals, Inc., 63 Wn.App 427, 433-34, 810 P.2d 814(1991), rev. denied, 118 Wn.2d 1023 (1992); State v. Henry, 36 Wn.App. 530, 525, 676 P.2d 521 (1984). "(T)he test must turn not only on whether the questioner is on the same side of the same issue at both proceedings, but also on whether the questioner had a substantially similar interest in asserting that side of the issue." State v. Mohamed, 132 Wn.App 58, 62, quoting United States v. DiNapoli, 8 F.3d 909, 912 (2d Cir. 1993). The general interest in testing the witness' credibility at each proceeding is NOT sufficient to establish similar motive. United States v. Bartelho, 129 F.3d 663, 671 (1st Cir. 1997)(cert. denied, 525 U.S. 905 (1998)).²

Where a fact is only peripherally related to the first trial but of critical importance to the second, the questioner did **not** have a similar motive to prove or disprove the point. U.S. v. DiNapoli, 8 F3d. at 912. In United States v. Taplin, 954 F.2d 1256 (6th Cir. 1992) the court held that testimony from a pretrial hearing on a motion to suppress was inadmissible because issues at pre-trial differ from

² It is proper to look at federal law where, as here, a Washington evidence rule is identical to the federal one. State v. Burton, 101 Wn.2d 124 761 P.2d 588 (1988); *overruled on other grounds by* State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988); compare FED. R. EVID. 804(b)(1) with ER 804(b)(1).

those at trial. In United States v. Wang, 964 F.2d 811 (8th Cir. 1992) the introduction of pretrial depositions was held to have violated the defendant's constitutional rights because the defendant was not advised of the specific charges against her at the time of the depositions.

An affirmative defense is one in which the defendant introduces evidence, which, if found to be credible, will negate criminal or civil liability, even if it is proven that the defendant committed the alleged acts. Black's Law Dictionary defines it as "new matter which, assuming the complaint to be true, constitutes a defense to it". citing, Carter v. Eighth Ward Bank, 33 Misc. Rep. 128, 07 N. Y. Supp. 300. It does not involve the same facts as a general denial of the elements of a crime, or attack upon the credibility of a witness. An affirmative defense is by definition one of new information and issues.

In Moore's case, constitutionally adequate confrontation of Storer was not achieved through an ineffective attorney who declared the entire issue of the towing of Moore's car "periphery" in her closing argument. The trial record taken as a whole supports the Superior court's conclusion that "...trial counsel failed to pursue this

affirmative defense because he was unaware of it. This failure was not a strategic decision. No effective attorney would have failed to raise this affirmative defense." See, Appendix B to Brief of Appellant. "The failure by counsel to properly raise this defense affected cross examination in a fundamental way because this defense was clearly appropriate in this case." Id.

In seeking discretionary review of this case the State contended that the superior court's decision in this matter was in conflict with State v. DeSantiago, 149 Wn2d 402, 414, 68 P.3d 1065 (2003). In that case the State added a charge of burglary to a case which was originally tried as a kidnapping case, and prior trial testimony of an unavailable witness was admitted. In finding no violation of confrontation, however, the court noted that in each of the two trials the defense theory was exactly the same, which was that the defendants were not in the home to engage in criminal activity, and therefore the similar motive requirement was met.

Unlike DeSantiago, Moore's case involved an affirmative defense, which required the establishment of particular and specific evidence that was ignored by counsel in the first trial despite the fact that the testimony and argument at trial placed the issue squarely in

the forefront of the case. The Superior court's decision in this matter was not in conflict with DeSantiago because the defense theory of the case was not the same in Moore's two trials. Nor, of course, was the ineffectiveness of the attorney during the prior testimony in question. The Superior court correctly held that the similar motive requirement of ER 804(b)(1) was not established under the facts of Moore's case and that the trial court abused its discretion in admitting the evidence.

D. CONCLUSION

The Superior court on RALJ appeal of this matter considered the record and authorities carefully in holding that Moore's original trial counsel rendered deficient performance, and that Moore suffered prejudice as a result. Moore did not have competent counsel at the time of the prior opportunity to confront Storer. Moore's Sixth Amendment right to confrontation was therefore denied when the prior testimony was admitted at a subsequent trial, after the first trial was overturned based on ineffective assistance of defense counsel. In addition, the trial court abused its discretion in admitting the testimony under both prongs of ER 804(b)(1). The prior opportunity was insufficient because Moore was represented by incompetent

counsel, and, in addition, the similar motive requirement of the rule was not satisfied.

For the foregoing reasons the Respondent respectfully asks this court to affirm the decision of the Superior court in this matter.

Dated this 15th day of February, 2013.

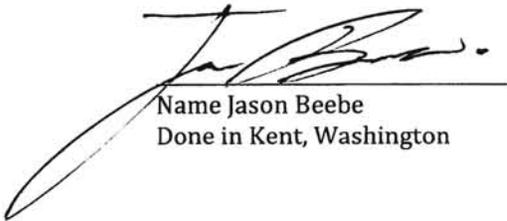
Respectfully submitted,



Jeannette Jameson, WSBA #24154
Attorney for Respondent Moore

Certificate of Service by Mail

Today I deposited in the mail of the United States, postage prepaid, a properly stamped and addressed envelope directed to the office of Daniel T. Satterburg, King County Prosecuting Attorney, W554 King County Courthouse, 516 Third Avenue, Seattle WA 98104, containing a copy of the Brief of Respondent in STATE V DONALD C. MOORE, Cause No. 67194-1-I, in the Court of Appeals for the State of Washington.



Name Jason Beebe
Done in Kent, Washington

2-19-2013

Date

APPENDIX E

FILED
KING COUNTY, WASHINGTON

FEB 08 2008

SUPERIOR COURT CLERK

DEPUTY

THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

DONALD C. MOORE,

Appellant,

No. 07-1-10560-0 SEA

v.

APPELLANT'S BRIEF

STATE OF WASHINGTON,

Respondent.

A. ASSIGNMENTS OF ERROR & ISSUES

1. Appellant assigns error to the judgment and sentence.
2. Appellant assigns error to the jury instructions on lawful use of force. Defense counsel rendered ineffective assistance of counsel for failing to proposed basic instructions on that defendant need not be in actual danger of injury or offense, that he had no duty to retreat and that he had a right to defend his property as well as himself. These instructions were all necessary to competently present a lawful use of force defense in this case. The failure to competently execute the selected strategy falls below the standard for competent representation. sufficient to cure the prejudice.

Appellant's Brief- 1

THE DEFENDER ASSOCIATION

810 Third Avenue, Suite 800

Seattle, WA 98104

Tel: (206) 447-3900, ext. 704

chris.jackson@defender.org

1 **C. STATEMENT OF THE CASE**

2 **1. Procedural History & Pretrial Motions**

3 Donald Moore was charged in King County District Court No. 270103850 with
4 Assault in the fourth degree in violation of RCW 9A.36.041. The charged incident occurred
5 on April 9, 2007. CP (Docket, Complaint). The defense was lawful use of force. The case
6 was tried to a jury and Mr. Moore was convicted as charged. He appeals that conviction.

7 In pre-trial motions, the State moved to admit prior convictions for purposes of
8 impeachment, but did not have any evidence of prior bad acts to submit under ER 404(b). VRP
9 6-8, 19.

10 **2. City's Case-In-Chief**

11 The complaining witness, Mark Storer, testified first for the State. VRP 22-35. Mr.
12 Storer is a tow truck operator. He was called to the Garden Point Apartments to tow a vehicle
13 from the parking lot. VRP 23. The manager of the apartments met him and signed the
14 impound authorization form. The form was not admitted as evidence. VRP 23. She described
15 the car to him as a blue Chevy Corsicia "beater with some broken windows" and told him
16 where it was parked. VRP 23. There was no testimony about why the vehicle was being
17 impounded; there was no testimony that the parking lot was posted with signs warning that
18 unauthorized vehicles would be towed. VRP 23-24. Mr. Storer located the car, backed his
19 tow truck up to the car and put the tow chain onto the front of the car. VRP 24.

20 Mr. Storer then testified that the defendant, Donald Moore, came from across the
21 parking lot and yelling, "Don't tow my car!" VRP 24. Storer responded, "I have to tow your
22 car. They told me to tow your car, I'm towing your car." VRP 24. At that point, Storer
23 claimed that Moore grabbed the j-hook from Storer. Storer yelled, "Don't touch my
24 equipment." Moore returned, "Don't touch my car." VRP 24. Moore reached down to

1 take the j-hook off of his car and Storer pushed his hand away. VRP 24. Storer claimed that
2 Moore then turned and struck him in the face with a closed fist. VRP 24-25. Storer reached
3 for his cell phone to call the office; he claimed that Moore slapped the phone out of his hand.
4 VRP 25. While Storer searched for his phone, Moore climbed into his truck and locked the
5 doors. A woman appeared. Moore told her to drive his car away. VRP 25. Storer then
6 went to hook the chain onto the car and, as he bent down, claimed that Moore kicked him in
7 the chest. VRP 25. Moore grabbed the loose end of the chain, wrapped it around his mirror
8 and put the rest of the chain in the car and told his friend to drive the car away. VRP 25.
9 Storer then raised the wheel of the car to prevent it from being driven away. VRP 25. Moore
10 then hit him 8 or 10 times in the back with a closed fist. VRP 25. Moore then tried to use the
11 controls in the truck to lower the car back down. VRP 25-26. He claimed that Moore
12 ransacked the inside of the truck looking for the keys. VRP 26.

13 The State then called Seneca Robben to the stand. VRP 35-39. Robben testified that
14 she saw Moore punch Storer in the face as he tried to tie a strap to Moore's car. VRP 36.
15 She did not see more than 2 seconds of the incident. She went back to her office to call the
16 police. VRP 38.

17 King County Sheriff's Deputy Peter Thalhofer was the State's next and final witness.
18 VRP 40-47. He responded to the call from the Garden Point Apartments. VRP 40. The
19 deputy spoke to both Storer and Moore. He observed scratches on Storer's face. VRP 41.
20 Moore told him that he was visiting at a second floor apartment when he saw that his car was
21 "hooked up" and about to be towed. VRP 41. He goes down and tells Storer, "You can't
22 take my car." VRP 41. Moore also said that Storer "went off on him for no reason." VRP
23 41. Moore said that he tried to get his car back, to unhook his car, and Storer punched him.
24 VRP 42, 43. Deputy Thalhofer testified that another deputy arrived and arrested "Moore for
25

1 a separate crime.” Defense counsel’s objection was sustained. VRP 43. The prosecutor then
2 asked the deputy, “did you form an opinion as to whether an assault had taken place.” Before
3 defense counsel could object, the deputy responded, “Yea, first I went back and talked to
4 Storer and second time and uh, and he, he agreed that (unintelligible).” Defense counsel then
5 objected, but did not move to strike. VRP 43. The prosecutor then asked the deputy, without
6 defense objection, whether he arrested Moore on this incident. The deputy said, “Yes. After
7 talking to Storer, [Moore] and Moore’s girlfriend (unintelligible). VRP 44.

8 On cross-examination, defense counsel elicited from the deputy that Moore complained
9 of pain. The deputy said that Moore claimed that a deputy beat him upon the way to the jail.
10 VRP 45. Nonetheless, Moore was taken to the hospital to be examined. VRP 46. On re-
11 direct, the prosecutor asked the deputy whether Moore’s claimed injuries were caused by the
12 other deputy. Thalhoffer responded,

13 Yeah, from the deputy that took him to the jail for driving recklessly and I think
14 he might have also been implying that when we arrested him we beat him up.
But that deputy was the deputy that, you know, were abusive or whatever.

15 VRP 46. The judge the broke in and sent the jury out. VRP 46. The judge admonished the
16 prosecutor to tell his witness to stop talking about arrests and “what the other arrests were for.”

17 VRP 46. After a brief re-cross examination, the deputy was excused.

18 The State published previously admitted pictures to the jury and then rested.

19 Defense counsel then moved for a mistrial based on the deputy’s violation of the pretrial
20 ruling regarding prior bad acts. VRP 47-48. The prosecutor claimed that defense counsel first
21 asked about the arrest. VRP 48. (The brief cross-examination is on VRP 44-46. Defense
22 counsel did not ask about Moore’s arrest. Counsel asked only about Moore’s pain
23 complaints.) It was only the prosecutor who asked about Moore’s arrest, VRP 44, and asked
24 the question to which the deputy gave the above answer. VRP 46. The judge ruled that the
25

1 deputy mentioned only during direct examinations about the “separate crime” and “reckless
2 driving” giving the impression that Moore was arrested for that, uncharged and unrelated crime.
3 VRP 48. The prosecutor claimed that the deputy was referring to Moore’s charge that the
4 other deputy’s reckless driving on the way to the jail had caused his injuries. VRP 46. After
5 further discussion and a review of the electronic record, the judge ruled that the State could not
6 re-open its case-in-chief, but could recall Deputy Thalhoffer solely to clarify the reckless driving
7 reference. VRP 55. In order to cure the prejudice from the “separate crime” remark, the
8 judge precluded the State from impeaching Moore with his prior convictions. VRP 55. As a
9 cure for the reckless driving comment, the judge crafted a brief permissible re-direct for Deputy
10 Thalhoffer. VRP 54-56, 58.

11 Deputy Thalhoffer was recalled and testified that his reference to reckless driving was
12 with regards to Moore’s claim on the way to the jail that he was injured. VRP 56, 59.

13 3. Defense Case-in-Chief

14 Donald Moore testified in his own defense. VRP 59-73. He testified that he was
15 visiting his father-in-law at the Garden Point Apartments. VRP 59-60. His son had been born
16 six weeks premature just two days earlier. He was taking a break to relax and was due back
17 at the hospital. He looked out and saw that his car was about to be towed. VRP 60. Moore
18 showed Storer his hospital bracelet and asked him, “Please don’t tow my rig. I’ll move it.”
19 VRP 60. Moore pleaded with Storer not to take the vehicle, pointing out his son’s birth
20 certificate in the back seat. Storer responded, “I don’t give a fuck. I’m taking it anyways,” and
21 hooked up the car. VRP 61. Moore knelt down to remove the chain from his car when Storer
22 hit him on the back, knocking him off balance. VRP 61. He believed that Storer was going to
23 strike again, so he got up and hit Storer. VRP 61. They continued to exchange blows as
24 Moore attempted to keep his car from being towed and Storer struggled to hook up the vehicle.

1 VRP 61-62. Moore was very upset as he needed his car to go and see his infant son who was
2 fighting for his life in the hospital. VRP 62. Moore then got in the tow truck and attempted to
3 use the controls to release his car. VRP 62. His only intent in striking Storer was to prevent
4 his car from being towed and to defend himself. VRP 62-63. He pleaded with Storer to stop.
5 Finally, Storer agreed to stop and the two waited for the police to come. VRP 63. Moore
6 testified that Storer hit him first. VRP 64.

7 On cross-examination, Moore explained that the two was "illegal." VRP 65. The
8 prosecutor also challenged him several times about why he did not just "walk away." VRP 65.
9 In response, Moore testified that he was defending his body and his property. VRP 65. He
10 also said that he did walk away at the end. VRP 65, 67. On cross, Moore testified that in
11 Washington he had a legal right to move his car. He believed that Storer was violating the law
12 and stealing his car. VRP 67. Moore said that Storer put the hook on the car after he asked
13 him to stop. VRP 67-69. Moore said that he chose not to walk away and have his property
14 stolen. VRP 69.

15 On re-direct, Moore explained that all of his efforts were made in defense of himself and
16 his car. VRP 71-73.

17 4. State's Rebuttal Case

18 In rebuttal, the State as permitted to call King County Sheriff's Deputy James Schauers
19 to testify only that say that Moore never claimed to be injured nor did the deputy observe any
20 injuries on Moore. The deputy also contradicted Moore's claim that his jacket was ripped.
21 VRP 77-79.

22 5. Jury Instructions

23 The court gave the defense's proposed instructions on self-defense. VRP 81. The only
24 instruction given on lawful use of force then was Instruction No. 7. That instruction was limited
25

1 to self-defense and did not include any language on lawful use of force to defend property.

2 **6. Closing Arguments**

3 The prosecutor argued that Moore “could not claim self-defense of property.”

4 You can’t. See I’m hitting this guy because I’m trying to protect my car. It has
5 to be about him. It has to be about his safety.

6 I that somebody who’s defending themselves? Is it more about the car or was
7 it about him?

8 VRP 2. Defense counsel argued only that Moore was defending himself, that Storer struck the
9 first blow and Moore was only defending himself. VRP 3-6. She argued that the matter of the
10 car was merely “periphery.” VRP 6.

11 **D. AUTHORITY & ARGUMENT**

12 **1. Defense counsel did not competently present Moore’s lawful use of force claim. Counsel failed to submit instructions necessary to argue self-defense and completely failed to present Moore’s valid defense of property claim.**

13 In a criminal proceeding, a defendant is guaranteed the right to effective assistance of
14 counsel. U.S. Amend. 6 & 14; Wash. Const. Art. 1 Sect. 22. To demonstrate ineffective
15 assistance of counsel, the defendant must show: (1) that trial counsel's performance fell below
16 an objective standard of reasonableness and was not undertaken for legitimate reasons of trial
17 strategy or tactics, State v. Saunders, 91 Wn.App. 575, 958 P.2d 364 (1998); State v.
18 McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995); and (2) that the deficient
19 performance prejudiced the defendant, i.e., there is a reasonable probability that, but for
20 counsel's unprofessional error, the result of the proceeding would have been different.
21 Saunders, 91 Wn.App. at 578; Strickland v. Washington, 466 U.S. 668, 687-88, 80 L.Ed.2d
22 674, 104 S.Ct. 2052 (1984).

23 Trial counsel's failure to properly execute a trial strategy may constitute ineffective
24 assistance of counsel. State v. Horton, 116 Wn.App. 909, 68 P.3d 1145 (2003). In Mr.

1 Horton's trial for rape of a child and child molestation, the alleged victim, S.S., had made several
2 pretrial statements that she had been sexually active with her boyfriend. Horton, 116 Wn.App.
3 at 913. In the State's case, S.S. testified that she had not had sex with anyone other than the
4 defendant. Id. On cross examination, defense counsel did not ask S.S. to explain or deny her
5 pretrial statements; defense counsel also did not request to have S.S. remain for additional
6 testimony. Id.¹ When defense counsel attempted to call witnesses to testify to S.S.'s pretrial
7 statements, the trial court sustained the State's objections for counsel's failure to comply with
8 ER 613(b). Id. at 914. The court found trial counsel's performance to be deficient because she
9 failed to lay a proper foundation for the impeachment. Horton, 116 Wn.App. at 916-17.
10 Counsel's failure to comply with the evidence rule fell below an objective standard of
11 reasonableness and the court could not discern any legitimate trial tactic for such this conduct
12 that would have benefitted Mr. Horton.

13 Here, trial counsel failed to present sufficient instructions on Moore's lawful use of force
14 defense. First of all, defense counsel failed to propose standard instructions on "no duty to
15 retreat" and "mistaken belief." See WPIC 17.05, 17.04.

16 It is reversible error to fail to give a "no duty to retreat" instruction when a person
17 asserting lawful use of force is in a place where he or she has a right to be. State v. Redmond,
18 150 Wn.2d 489, 493-94, 78 P.3d 1001 (2003). Like this case, Redmond involved an
19 altercation in a parking lot. The objective facts were that the complaining witness was between
20 his car and the Redmond, "arguably leaving Redmond with an easy opportunity to retreat." Id.
21 The Washington Supreme Court reversed the Court of Appeals opposite decision, which relied
22 on Redmond's subjective assessment of whether retreat would be a viable option. Id. The

23
24 ¹Defense counsel only asked S.S. about her earlier testimony by asking, "You told the
25 prosecutor this morning that you had not engaged in sexual intercourse with anyone other than
26 Mr. Horton; correct?" S.S. eventually answered, "No." Id.

1 supreme court's rationale supports a no duty to retreat instruction in this case.

2 Where the only objective facts suggest that retreat would be a reasonable alternative
3 to the use of force, the risk that jurors would conduct their own evaluation of the
4 possibility of retreat is not sufficiently diminished by testimony regarding the defendant's
5 speculation about his chances for a successful retreat. To the contrary, such testimony
6 may invite the jurors to engage in their own assessment of the defendant's opportunity
7 to retreat. As noted above, where the possibility of such speculation exists, the jury
8 should be instructed that the law does not require a person to retreat when he or she
9 is assault in a place where he or she has a right to be.

10 Id. The court noted that the risk was exacerbated where the prosecutor argued in closing
11 implied a duty to retreat. Id. at note 3.

12 [T]he no duty to retreat instruction is required where, as in this case, a jury may
13 objectively conclude that flight is a reasonably effective alternative to the use of force
14 in self-defense. The trial court cannot allow the defendant to put forth a theory of self-
15 defense, yet refuse to provide corresponding jury instructions that are supported by the
16 evidence in the case.

17 Id.

18 Clearly, Moore would have been entitled to the instruction had it been requested under
19 the facts of this case. Moore was in the parking lot of the Garden Point Apartments. He was
20 visiting his father-in-law. There was no evidence proffered by the State that Moore did not
21 have a right to be there. In fact, this case is nearly identical in this respect to *Redmond*. Also,
22 here the prosecutor argued that Moore did not have a right to stand his ground but should have
23 withdrawn. Finally, there appeared to be no strategic reason for Moore's lawyer to give up
24 this crucial instruction to support his case. Defense counsel's failure to provide the proper
25 instruction was clearly prejudicial and may have lead to Moore's conviction. See *State v. Aho*,
26 137 Wn.2d 736, 745, 975 P.2d 512 (1999) (no legitimate tactic exists fro proposing an
27 instruction for a crime that did not exist at the time of the offense); *State v. Ermert*, 94 wn.2d
28 839, 849-50, 622 P.2d 121 (1980) (failure to object to an instruction that incorrectly set out
the elements of the crime where such a failure permitted defendant to be convicted of a crime
not established by the prosecution). Here, defense counsel's failure to propose an instruction

1 to which her client was entitled prejudiced him because it lessened the State's burden to rebut
2 his claim of self-defense and permitted the prosecutor to argue what the law does not support,
3 that Moore somehow had a duty to retreat.

4 While the failure to give a "mistaken belief" instruction is not similarly reversible error
5 where the primary instruction contains the "reasonable belief" language used here, State v.
6 Kitchen, 57 Wn.App. 95, 99, 786 P.2d 847 (1990, defense counsel's failure to do so belies
7 an incompetent understanding of the lawful use of force defense.

8 **2. Defense counsel's failure to propose a defense of property instruction also fell**
9 **below the standard of competent representation**

10 The use of force is lawful "[w]hen used by a party . . . in preventing or attempting
11 to prevent an offense against his or her person, or a malicious trespass, *or other malicious*
12 *interference with real or personal property lawfully in his or her possession"*
13 RCW 9A.16.020. The statute codifies the common law rule. State v. Bland, 128 Wn.App.
14 511, 513-14, 116 P.3d 428 (2005) (reasonable force may be used to expel a trespasser).

15 It is the generally accepted rule that a person owning, or lawfully in possession of,
16 property may use such force as is reasonably necessary under the circumstances in
order to protect that property, and for the exertion of such force he is not liable either
criminally or civilly.

17 Peasley v. Puget Sound Tug & Barge Co., 13 Wn.2d 485, 506, 125 P.2d 681 (1942), *quoted*
18 *in Bland*, 128 Wn.App. At 513. "In defense of property, there is no requirement to fear injury
19 to oneself." Bland, 128 Wn.App. at 513.

20 The law focuses on the actor's legal relationship to the property. Does the actor have
21 a lawful right to possess the property? See State v. Mierz, 128 Wn.2d 670, 670-71, 901 P.2d
22 286 (1995) (Mierz was not in lawful possession of the coyotes so he had no right to sue force
23 to defend them). Here, the State failed to produce any evidence to rebut Moore's testimony
24 that the car was his belief that the tow was "illegal." Moore used unreasonable force in
25

1 attempting to prevent his car from being stolen or illegally towed by Storer. It is the
2 prosecution's burden to prove otherwise. The jury might well have rejected Moore's self-
3 defense argument if they believed that he was acting to protect his car not himself. The
4 prosecution urged that analysis. But the jury had no legal framework to apply to that situation
5 because defense counsel failed to proposed instructions to support that version of the defense.
6 Again, there was no valid strategic reason to fail to propose this instruction. The failure to
7 provide this instruction deprived Moore of a valid defense supported by the law and the facts
8 of the case. The defense of property instruction is not a model of clarity. Bland, 128 Wn.App.
9 at 514-15. Nonetheless, had the jury been given WPIC 17.02 in its entirety, the jury may have
10 believed Moore was lawfully attempting to prevent his car from being illegally towed. Despite
11 Moore's protestations to the contrary, the State made no attempt to show that the tow complied
12 with the statute. RCW 46.55.070 and et. seq.

13 Counsel's failure to discover and advance a defense that is supported by the law and
14 the facts to the prejudice of her client, constitutes ineffective assistance of counsel. In re PRP
15 Hubert, 138 Wn.App. 924, 158 P.3d 1282 (2007).

16 **3. The assault statute violates the separation of powers doctrine because the**
17 **Legislature has failed to legislate the elements of the crime of assault.**

18 The Court of Appeal has ruled that the legislature's failure to legislate the elements of
19 assault does not violate the separation of power doctrine. State v. Chavez, 134 Wn.App. 657,
20 142 P.3d 1110 (2006), *review pending*, State v. Chavez, Washington Supreme Court No.
21 79265-8 (oral argument on October 23, 2007). Mr. Moore raises this issue here in the event
22 that the Washington Supreme Court rules in the defendant's favor in this matter.

23 It is the function of the Legislature to define the elements of a crime. *State v.*
24 *Wadsworth*, 139 Wn.2d 724 at 734, 991 P.2d 80 (2000). This is so "because of the
25 seriousness of criminal penalties, and because criminal punishment usually represents the moral

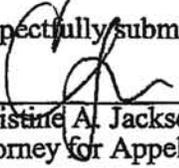
1 condemnation of the community... This policy embodies 'the instinctive distastes against men
2 languishing in prison unless the lawmaker has clearly said they should.'" *U.S. v. Bass*, 404 U.S.
3 336 at 348, 92 S.Ct. 515 (1971), *citations omitted*.

4 The Legislature has criminalized assault; however it has not defined that crime. RCW
5 9A.36.041; Court's Instruction No. 8, compare with Court's Instruction No. 4. Instead, it has
6 allowed the judiciary to define the core meaning of the crime; the judiciary has done so,
7 enlarging the definition over a period of many years. This violates the separation of powers.

8 **E. CONCLUSION**

9 For the foregoing reasons, Mr. Moore's conviction should be reversed and the case
10 remanded for a new trial.

11 Respectfully submitted this 8th day of February, 2008.

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13 _____
14 Christine A. Jackson WSBA #17192
15 Attorney for Appellant
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