

NO. 68853-7-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ERIK SCHUMANN,

Appellant.

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE KIMBERLEY PROCHNAU

**BRIEF OF RESPONDENT**

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

JENNIFER P. JOSEPH  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

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A. ISSUE

“Abandonment” is not a statutory defense to residential burglary, nor would a defendant be entitled to have the jury instructed on such a defense when the evidence establishes that a home was not abandoned at the time of the burglary. Where Schumann cannot establish that the trial court would have instructed the jury on an abandonment defense, has he failed to show that his trial counsel was ineffective for failing to propose such an instruction?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Erik Schumann with one count of residential burglary. CP 1. The jury found him guilty as charged, and the trial court entered a standard range sentence of 16 months. CP 46, 49, 51. Schumann timely appealed. CP 57.

## 2. SUBSTANTIVE FACTS

Michael Brunson has lived in his home in a middle class, suburban neighborhood of Shoreline for decades. 3RP 12.<sup>1</sup> He has not spent even one night away from home since 2009. Id. at 16.

On the morning of February 3, 2012, Brunson heard a loud noise and discovered that someone had broken into the basement of his house by breaking the window in an exterior door. 3RP 16. Brunson reported the break-in to the police, but had to leave on an urgent errand before he was able to board up the window. Id. at 18-20. He locked the door, however, and moved a file cabinet in front of it. Id. at 20.

When Brunson returned home late that evening, he turned on the kitchen light and had something to eat. 3RP 21. At around 11:00 p.m., he went to check on the basement. Id. at 21, 70. As he descended the stairs, he heard a male voice from the other side of the divided basement. Id. at 22. Brunson retreated and called 911. Id. Police arrived approximately five minutes later. Id.

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<sup>1</sup> There are five volumes of the verbatim report of proceedings referenced as follows: 1RP = May 15, 2012; 2RP = May 16, 2012; 3RP = May 17, 2012; 4RP = May 18, 2012; 5RP = May 23, 2012.

Two of the officers went around to the back of the house, where they found Schumann and a female companion in Brunson's basement. 3RP 60-61. The two came out of the basement when instructed by an officer. Id. at 61. Schumann was wearing gloves. Id. at 72. He had two sets of pliers, a "mini crowbar," two flashlights and a handsaw. Id. at 72, 75, 77-78, 81. Schumann also had a knife, which he had taken from Brunson's basement. Id. at 25, 31, 52-53, 72.

Officers arrested Schumann. 3RP 71. From jail, Schumann called a friend; the conversation suggested that the friend was unaware that Brunson's home was occupied. Ex. 24; 3RP 124, 139-40.

At trial, Brunson testified that the knife found on Schumann had been taken from a butcher block in his basement, along with several other knives. 3RP 39, 52-53. Many other items had been moved or packed up in boxes, bags, and over a dozen plastic tote boxes. Id. at 28-29, 39. Brunson also testified that someone had enlarged an existing small hole in the heavy wooden door that divides the basement. Id. at 30. Brunson had given no one permission to be in his home or to move or take anything from it. Id. at 25.

Schumann elicited testimony concerning the condition of Brunson's home. Two of the responding officers testified that Brunson's property was overgrown, cluttered, and in disrepair. 3RP 65-66, 112. Brunson acknowledged that his property is more densely wooded than the surrounding properties. Id. at 13.

In closing argument, Schumann's counsel argued that neither of the elements of residential burglary was met. She pointed to the condition of Brunson's property as evidence of "Erik's belief that the house was empty at the time he was there. And abandonment is a defense to residential burglary, and Erik thought the house was abandoned." 3RP 139. The trial court overruled the prosecutor's objection, explaining, "I'm going to allow her to make argument, but I'll indicate that the jury is to make their determination as to the facts and the law based on the evidence in this case and the court's instructions." Id. Schumann's counsel then went on to argue that "[i]t doesn't matter how reasonable or unreasonable, how right or wrong Erik's belief was that the house was abandoned, and he was, therefore, not committing crime. All that matters is that was his belief at the time. He thought he could go in there and take things, because he thought no one lived there." Id. at 140. She further argued that, absent "overwhelming evidence

of Erik's intent, what was in Erik's mind on February 3<sup>rd</sup>, then you are to consider the lesser crimes that we've been talking about, of criminal trespass in the first degree[.]” Id. at 141.

In rebuttal, the prosecutor disputed the defense theory, arguing: “[W]hether or not the defendant believed that the property was empty is irrelevant. It remains a crime to enter a property that you believe is empty with intent to steal property.” 3RP 145.

C. ARGUMENT

SCHUMANN'S COUNSEL WAS NOT INEFFECTIVE FOR DECLINING TO REQUEST AN INSTRUCTION ON AN INAPPLICABLE DEFENSE THAT WAS UNSUPPORTED BY THE EVIDENCE.

Schumann contends he received ineffective assistance of counsel because his attorney failed to request a jury instruction supporting his defense that he believed that Brunson's home was vacant and that any property located therein was therefore free for the taking. Because he was not entitled to such an instruction, his counsel was not deficient for failing to request one.

To prevail on a claim of ineffective assistance of counsel, Schumann must establish both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To show deficient performance, Schumann must show that his counsel's performance fell below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). In judging the performance of trial counsel, courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

To show prejudice, Schumann must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." Id.

Since Schumann claims ineffective assistance of counsel based on the failure to request a jury instruction, he must show that he was entitled to the instruction, that counsel's performance was deficient in failing to request the instruction, and that the failure to request the instruction prejudiced Schumann's defense. State v.

Johnston, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007). This he cannot do.

Schumann's claim relies on State v. J.P., 130 Wn. App. 887, 125 P.3d 1215 (2005). There, Division Three of this Court held that because the statutory defense of abandonment of property negates the unlawful entry element of the crime of criminal trespass, abandonment should also be available as a defense to residential burglary, which shares the same element. Id. at 894-95. His reliance is misplaced.

First, while J.P.'s holding may have "a measure of logical appeal," it is foreclosed by the plain language of RCW 9A.52.090. State v. Jensen, 149 Wn. App. 393, 400, 203 P.3d 393 (2009). The statute provides as follows:

In any prosecution under RCW 9A.52.070 [first degree criminal trespass] and 9A.52.080 [second degree criminal trespass], it is a defense that:

(1) A building involved in an offense under RCW 9A.52.070 was abandoned; or

(2) The premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises; or

(3) The actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him or her to enter or remain; or

(4) The actor was attempting to serve legal process which includes any document required or allowed to be served upon persons or property, by any statute, rule, ordinance, regulation, or court order, excluding delivery by the mails of the United States. This defense applies only if the actor did not enter into a private residence or other building not open to the public and the entry onto the premises was reasonable and necessary for service of the legal process.

RCW 9A.52.090.

In Jensen, Division Two of this Court relied on the statute's plain language to disagree with J.P. "As with any other statute, where the language of a statutory defense is clear, its plain language is to be applied as written." Jensen, 149 Wn. App. at 401 (citing Morgan v. Johnson, 137 Wn.2d 887, 891-93, 976 P.2d 619 (1999)). Because the legislature expressly limited the defenses to criminal trespass, "RCW 9A.52.090(1)'s abandonment defense is not available regarding [the] offense of second degree burglary." Id. Accordingly, counsel was not ineffective for failing to offer an instruction on the defense. Id. Under Jensen, Schumann's ineffective assistance claim fails.

Further, even if an abandonment defense may be asserted in a burglary prosecution, counsel is not deficient in failing to

propose an instruction that is not supported by the evidence. See State v. Kruger, 116 Wn. App. 685, 690-91, 67 P.3d 1147 (2003).

In J.P., the court observed that while J.P. was entitled to assert the abandonment defense, the evidence established that the empty, locked house was “not abandoned at the time.”

130 Wn. App. at 896. Accordingly, “the unlawful entry is not negated by RCW 9A.52.090(1).” Id. at 896. The same is true here.

The evidence is that Brunson’s home was not empty and had been occupied continuously for decades. The doors were locked, Brunson was home, and there was at least one light on in the house at the time of the late-night burglary. And Schumann wore gloves, which suggests he knew he was not free to enter the home and was trying to avoid detection. Because the facts do not support an abandonment defense, Schumann’s counsel could reasonably and correctly conclude that no such instruction was warranted.

Schumann nevertheless contends that his “subjective belief that the premises were abandoned is sufficient to trigger” the abandonment defense. Brief of Appellant at 7. He cites State v. Montague, 10 Wn. App. 911, 918, 521 P.2d 64 (1974), in support of the proposition that a “mistake of fact” defense may be available for

burglary if the defendant makes an honest mistake of fact and his conduct would be lawful if the facts were as he believed. But even if Schumann's alleged belief that Brunson's home was abandoned is enough to trigger an abandonment defense, that does not establish that Schumann was entitled to a jury instruction to explain it. As the Montague court noted, a trial court is not required to give instructions to "explain those things which will not constitute a crime[.]" 10 Wn. App. at 917.

Moreover, Schumann is relying on a statutory defense, the parameters of which must be gleaned from the statute itself. While RCW 9A.52.090(3) provides a defense to criminal trespass when the actor "reasonably believes" he or she has permission to enter the premises, the statute makes no mention of "reasonable belief" as to the abandonment defense. Rather, it is only a defense that the building involved "*is abandoned.*" RCW 9A.52.090(1) (emphasis added). "Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius*—specific inclusions exclude implication." Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 571, 980 P.2d

1234 (1999) (quoting Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish County, 77 Wn.2d 94, 98, 459 P.2d 633 (1969)). See also State v. Finley, 97 Wn. App. 129, 138, 982 P.2d 681 (1999) (with respect to another statutory defense to criminal trespass, that the establishment was open to the public, “[w]hat Mr. Finley ‘understood’ or ‘believed’ is not relevant to whether his presence was unlawful under the public premises defense, RCW 9A.52.090(2)”).

Even if Schumann’s trial counsel should have requested an instruction on the abandonment defense, Schumann fails to satisfy the second prong of the Strickland test: a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 687. This is so both because the jury instructions did not preclude Schumann from arguing his abandonment theory, and because the evidence was plainly inconsistent with that defense.

In State v. Ponce, Division Three observed that “J.P. does not require that a jury be specifically instructed on matters that negate an element of the charged offense if the jury instructions as a whole make clear the State’s burden of proving unlawful entry and intent to commit a crime.” 166 Wn. App. 409, 411, 269 P.3d

408 (2012). The Ponce court held that the trial court did not err by refusing to instruct the jury that Ponce's statutory defense of permissible entry to the crime of criminal trespass was a defense to his second degree burglary charge as well. Id. Because the standard "to convict" instruction adequately informed the jury of the State's burden to prove that Ponce "entered or remained unlawfully in a building," and that "[a] person enters or remains unlawfully ... when he or she is not then licensed, invited, or otherwise privileged to so enter or remain," Ponce was permitted to argue his theory of permissible entry. Id. at 420. Thus, the court did not err in refusing to instruct the jury on the "permissible entry" defense.

The jury instructions in this case are virtually identical to those given in Ponce. CP 34, 37, 39. As in Ponce, these instructions correctly stated the law and enabled Schumann to argue his theory that, because he believed that the home was abandoned and "he could just go there and take things," he lacked intent to commit a crime. See 3RP 138-40. Schumann cannot establish prejudice from his counsel's failure to propose a more specific instruction on the defense of abandonment. See State v. Cienfuegos, 144 Wn.2d 22, 25 P.3d 1011 (2001) (counsel's failure to request diminished capacity defense, even when warranted by

the facts, caused no prejudice where general jury instructions allowed parties to argue capacity to form intent).

Finally, Schumann cites State v. Powell, 150 Wn. App. 139, 206 P.3d 703 (2009), for the proposition that the absence of an instruction on abandonment “nullified” his defense. Powell is inapposite.

Powell was charged with second degree rape for engaging in sexual intercourse with a person who was incapable of consent because of mental incapacity or physical helplessness. Id. at 142. The legislature created a statutory defense to that charge where the accused “reasonably believed that the victim was not mentally incapacitated and/or physically helpless.” Id. at 153 (quoting RCW 9A.44.030(1)). Even though the evidence strongly supported that defense, and even though Powell had in fact relied on that defense throughout trial, his counsel unaccountably failed to request a “reasonable belief” instruction. Id. at 155. Division Two held that the failure constituted deficient performance. Id. The court further held that Powell was prejudiced as a result, because without the instruction, “it would have appeared to the jury that it had no option but to convict Powell if it found beyond a reasonable doubt that [the victim] had been mentally incapacitated or physically helpless,

regardless of whether it also found that Powell reasonably believed [she] had consented.” Id. at 156-57.

This case is not like Powell. Schumann’s defense was that his belief that the property was abandoned proved he lacked intent to commit any crime. The instructions directed the jury to acquit Schumann if it found that he lacked such intent when he entered Brunson’s home. CP 39. Thus, the absence of an abandonment defense instruction did not “nullify” Schumann’s defense.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Schumann’s conviction for Residential Burglary.

DATED this 1<sup>st</sup> day of March, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
JENNIFER P. JOSEPH, WSBA #35042  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer J. Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT in STATE V. SCHUMANN, Cause No. 68853-7 -I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 1<sup>st</sup> day of March, 2013

  
\_\_\_\_\_  
Wynne Brame  
Done in Seattle, Washington