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NO. 63334-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL THRASHER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS NORTH

BRIEF OF RESPONDENT

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A. ISSUES

1) Did the prosecutor permissibly note at trial that Thrasher, in a telephone call with a detective whom he had never met, directed the detective to speak with Thrasher's former lawyer, where Thrasher's identity as the person on the telephone was in question, where the prosecutor did not ask the jury to infer guilt from the fact that Thrasher had invoked his right to counsel, where Thrasher had said in pretrial hearings that he believed his former attorney's testimony would corroborate his defense, and where he did not object to testimony or argument on this point?

2) Where Thrasher admitted all elements of the crime except knowledge, was any error in referring to his former lawyer harmless beyond a reasonable doubt?

3) Was defense counsel's decision to forgo a "necessity" instruction, and to instead argue that Thrasher's medical issues showed a lack of "knowledge," a reasonable tactical decision where necessity was not a viable defense?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Thrasher was charged by information on July 31, 2008 with felony failing to register as a sex offender "during a period of time intervening between April 14, 2008 and July 14, 2008." CP 1. As the case proceeded toward trial, Thrasher complained on October 14, 2008, that counsel had not contacted witnesses, including his former attorney, Carol Ellerby. 1RP 4-10.¹ The court found that counsel was adequately investigating and contacting witnesses. 1RP 10-11. An amended information was filed on October 31, 2008. CP 8.

On December 16, 2008, the case was assigned to the Honorable Dean Lum for trial, and pretrial motions, including a CrR 3.5 motion, were heard. 2RP 3-33. Court was adjourned until January 5, 2009. On January 5th, the date on which *voir dire* was to begin, Thrasher asked to proceed as his own attorney. 3RP 2.

¹ The verbatim reports will be cited as follows: 1RP = 10/14/08 Judge Carey (motion hearing); 2RP = 12/16/08 Judge Lum (pretrial hearing); 3RP = 1/5/09 Judge Lum (*pro se* status granted, trial continued); 4RP = 2/11/09 Judge Halpert (access to legal materials in jail); 5RP = 2/25/09 Judge Halpert (access to legal materials motion and counsel reinstated); 6RP = 3/18/09 Judge Armstrong (short hearing re: alleged conflict); 7RP = 3/18/09 Judge North (pretrial hearings); 8RP = 3/19/09 Judge North (trial proceedings); 9RP = 4/13/09 Judge North (sentencing).

That request was granted and the case was continued for a month.
3RP 16-19; CP 21.

Two hearings were held on February 11 and 25th, wherein Thrasher claimed the jail was not providing adequate access to legal research. See 4RP and 5RP. Ultimately, on February 25th, Judge Halpert denied Thrasher's motions for a continuance and for greater access to legal materials. 5RP 31-33. An order was entered that day reinstating counsel for Thrasher. CP 103.²

On March 18, 2009, the case was assigned for trial but Thrasher brought a motion to continue based on an alleged conflict of interest because he wanted to call his former lawyer, Carol Ellerby, as a witness, and Ellerby worked in the same public defender agency as trial counsel, John Ewers. 6RP 4-6. Judge Armstrong, concerned that Thatcher was attempting to delay the case, referred the motion to the trial judge.

Trial was held before the Honorable Douglass North and, with pretrial hearings, jury selection, testimony, and argument, lasted two days. See 7RP (pretrial hearings) and 8RP (testimony and closing arguments). On March 18, 2009, Judge North held a

² The verbatim report of proceedings for 2/25/09 does not address the reasons for this change of status.

closed hearing wherein Thrasher described his reasons for calling Ellerby as a witness. 7RP 27-33. Thrasher was convicted as charged. CP 217. The jury found by special interrogatory that he had committed the offense by failing to register a complete address and by failing to report weekly. CP 218.

2. SUBSTANTIVE FACTS

The evidence in this case was presented in a single day through two witnesses for the State. See 8RP 4-23 (Seattle Police Department Detective Vrandenburg), 24-48 (King County Sheriff's employee Dallas Arner).

Det. Vrandenburg testified that Thrasher first listed his address as 512 Third Avenue, Seattle, Washington, Apartment 210. 8RP 9-10. This address does not exist, as the King County Courthouse takes up the entire block. 8RP 9. Det. Vrandenburg checked to see if Thrasher was registered with the homeless shelter across the street from the courthouse; he was not. 8RP 10-11. Thrasher subsequently submitted a change of address form on May 15, 2008, listing his residence as 1213 Third Avenue, Seattle, Washington, Apartment 210. 8RP 16. There is an office building at this location, but there is no residence. 8RP 16-17.

Dallas Arner from the King County Sheriff's Office testified as to the laws and procedures applying to sex offender registration, 8RP 24-29, the offender registration documents filed by Thrasher, 8RP 29-45, and to the fact that Thrasher had registered changes of address seven times before April, 2008. 8RP 46. She noted that a sex offender must initially register at the King County Courthouse because fingerprints must be taken. 8RP 28. After the initial registration, the offender may register a change of address by returning to the courthouse, dropping a change of address form in the U.S. mail (as many times as he wants, even weekly), or by going to the Regional Justice Center in Kent. 8RP 29-32. The offender need not appear in person at the Courthouse. A person without a permanent address must register as homeless, and then he must check in weekly at the King County Courthouse. 8RP 37-40.

Arner confirmed that Thrasher had filed registration documents listing false addresses. 8RP 43. Once Thrasher registered as homeless, on June 16, 2008, he failed to ever report, much less report weekly, as required. 8RP 41-42. A stipulation was also presented to the jury regarding Thrasher's prior conviction that triggered his duty to register. CP 48-51; CP 216.

Thrasher testified and claimed that various medical conditions prevented him from registering. 8RP 53-71. He admitted that the addresses he provided to the King County sheriff were not addresses where he was living. 8RP 73, 75. He testified that in April, 2008, he lived with a friend named Kyla Frias in a house in Kent. 8RP 52. He stayed with Frias "continually" and was permitted to stay as long as he got along with other residents, but not forever. 8RP 66-67. Upon release from the hospital on April 22nd, he listed his sister's Enumclaw address on discharge papers, 8RP 58-59, and on release from the hospital on June 16th, he listed his brother's address in Ravensdale on the discharge paperwork. 8RP 60-62. He confirmed that he traveled to the courthouse three times in the charging period to register a change of address, 8RP 81, and that he never told the investigating detective that medical issues would prevent weekly trips. 8RP 81-83.

At sentencing, Thrasher asked the court to impose a mitigated exceptional sentence because his medical condition should be considered an incomplete defense to the knowing element in failure to register. CP 236; 9RP 6-10. In his allocution, Thrasher said that he had not registered because he had outstanding warrants for his arrest at the time of these offenses,

that he served time in jail, and that his medical problems prevented registration. 9RP 11-13. The court rejected his request, finding that Thrasher had not shown an incomplete defense because he could have registered and complied with the law. 9RP 14. The court noted that Thrasher had knowingly failed to register the Kent address where he had been staying. Id. The court imposed sentence at the bottom of the standard range. Thrasher has appealed. CP 253-54.

C. ARGUMENT

Thrasher argues that his case must be reversed for retrial because the prosecutor inappropriately elicited testimony that Thrasher did not wish to speak to the detective and instead wanted the detective to work through his lawyer. Br. of App. at 8-30. This claim was not preserved and should not be reviewed on appeal. Even if reviewed, however, the claim is not a basis for reversal because any error was harmless beyond a reasonable doubt.

Thrasher also asserts that his lawyer was ineffective for failing to pursue a necessity defense. Br. of App. at 31-40. In truth, however, Thrasher had no defense to these charges. He admitted giving two false addresses when he registered as a sex offender,

he did not register the address where he was actually staying (likely because he was on warrant status at the time), and his health issues would have been relevant only if he had a legitimate basis to claim that he was *actually* homeless and that he was medically unable to meet the weekly check-in requirements for homeless sex offenders. He could not prove these facts by a preponderance of the evidence. His lawyer was not deficient and he has not established prejudice.

1. THE PROSECUTOR'S QUESTIONING AND ARGUMENT WERE NOT REVERSIBLE ERROR UNDER THE CIRCUMSTANCES OF THIS CASE.

Thrasher claims that the prosecutor should not have elicited testimony that he told the investigating detective to call his former attorney. Br. of App. at 8-30. This claim was not preserved, and was harmless in any event.

a. Facts.

Three factual predicates are relevant to this claim. First, the prosecutor needed to establish that Detective Vrandenburg had spoken to Thrasher over the telephone, and the identity of Carol Ellerby was a component of that proof. Second, from very early on in this case, it was clear that Thrasher viewed his former attorney

as an important element in his defense, and it seemed likely that he would attempt to elicit such facts, himself. Third, defense counsel acquiesced to this testimony, likely because Thrasher wanted him to. The relevant facts are set forth below.

i. Identity of Thrasher as the telephone caller.

On December 16, 2008, Thrasher's counsel filed a trial brief asserting that "[b]ecause Mr. Thrasher entered a plea of not guilty, all facts are in dispute." CP 15. Counsel also argued that Det. Vrandenburg's May, 2008 conversation with Thrasher over the telephone should be suppressed because the detective could not establish that he had, indeed, been talking to Thrasher. CP 17. At the CrR 3.5 hearing on December 16, 2009, Det. Vrandenburg testified about those telephone conversations with Thrasher. Counsel cross-examined the detective regarding whether the detective could say with any certainty that he had spoken to Thrasher, instead of someone else, on the telephone. Defense counsel asked whether the detective had ever met Thrasher personally, whether he could show the location of the telephone number he called (including whether it was a land line or a cell phone), that he had never before heard Thrasher's voice. 2RP 24-

27. At trial, too, defense counsel confirmed that Det. Vrandenburg had never met Thrasher. 8RP 23.

- ii. Thrasher's attempts to introduce evidence about his former lawyer, Ellerby.

On October 14, 2008, Thrasher appeared before the Honorable Cheryl Carey with complaints about the investigation being performed by his trial counsel, and with a request for new counsel. 1RP 4-6. The court asked counsel, John Ewers, about potential witnesses. 1RP 6-9. A witness that Thrasher wanted to call was Carol Ellerby, his former attorney. 1RP 8. After counsel described his efforts to contact witnesses, the trial court noted that counsel was actively investigating the case, and denied the motion to substitute counsel. 1RP 11.

During a CrR 3.5 hearing on December 16, 2008, Detective Vrandenburg testified that Thrasher had told the detective that he would deal with the detective only through counsel, Carol Ellerby, and to his subsequent dealings with Ms. Ellerby. 2RP 21. On cross-examination by Mr. Ewers, the detective confirmed that he had follow-up conversations with Ms. Ellerby. 2RP 26-27.

On January 5, 2009, Thrasher moved to go *pro se*. As part of his inquiry into the reasons for Thrasher's motion, Judge Lum

asked Thrasher about witnesses he wanted subpoenaed for trial.

Thrasher mentioned "both my previous lawyers." 3RP 8.

On the eve of trial, March 18, 2009, Mr. Rick Lichtenstadter appeared in court because he was concerned that calling TDA lawyer Ms. Ellerby as a witness might present a conflict of interest since trial counsel John Ewers and Carol Ellerby both worked for TDA. 6RP 4-6 (before Honorable Sharon Armstrong).

Mr. Lichtenstadter was a supervisor at The Defender Association (TDA). Judge Armstrong was suspicious that Mr. Thrasher was simply attempting to delay his trial, but she referred the matter to the trial judge, the Honorable Douglass North. 6RP 5-6.

Mr. Lichtenstadter then appeared before Judge North and repeated his concern that the trial court consider the matter *in camera*. 7RP 2. It was then made clear what Thrasher wanted vis-a-vis his former counsel: "Mr. Thrasher has indicated that he wishes to call an attorney from our office, Carol Ellerby . . . it is our decision . . . not to call her, but Mr. Thrasher has indicated that he wishes too (sic)." 7RP 5. The courtroom was then closed and the record of the closed proceedings was sealed. 2RP 11-15; CP 212.

In the sealed portion of the proceedings, Mr. Thrasher offered two reasons for wanting Ms. Ellerby as a witness. 7RP 18.

First, Mr. Thrasher mistakenly believed that Det. Vrandenburg was going to testify that Thrasher was trying to lure Vrandenburg to a location where he (Thrasher) could assault Vrandenburg. 7RP 27-32. The court and counsel made it clear that Vrandenburg would not be offering such testimony. 7RP 30-32.

Second, Thrasher explained that he wanted Ellerby to testify so she could confirm that Thrasher was not trying to avoid the detective, but rather that he simply wanted Ellerby to run interference with the detective, and that it was the detective, not Thrasher, who mishandled the situation. Thrasher said:

I just I -- the reason I intended to have her in there in the beginning was because potentially my other witnesses are not going to be able to show up and she's the --- Ms. Ellerby is the only one that can verify the facts that I did ask for --- when my Miranda rights were read to me that I did contact counsel like I'm supposed to and that I did have a conversation with my lawyer about the situation that I wasn't trying to evade or run or hide from somebody or, you know, that I was trying to do any wrong doing and that she would testify to the facts that I, you know, that I had gone to her first and asked her for assistance and she said that she would be there to take care of this --- help me with the situation and I --- I don't have anybody else who would be able to testify to my facts except for my --- the provided witnesses that I have that were to be called in the beginning and she's the only one that would be there to testify that Mr. Vrandenburg's story whether he called her or she called him . . . because he's . . . trying to make it like he . . . wasn't doing anything wrong or anything like that and that he had

the right to contact me and there he was --- he was . . . going by what the law says and Ms. Ellerby says, no, that's not the way it was supposed to be done, you had no right to contact Mr. Thrasher, period. You know, you should have went (sic) through other channels.

7RP 32-33.³ In short, Thrasher seemed to believe that Ms. Ellerby had told him that Vrandenburg had acted illegally. See 7RP 22 (Ellerby said, "You did the right thing"). But, Judge North told Thrasher that the detective was within his rights to call Thrasher on the telephone, and that Thrasher was also in his right to direct the detective to his lawyer. The Court concluded that Ellerby was not a critical witness, so there was no conflict. 7RP 35.

iii. Trial testimony and argument.

At trial, Detective Vrandenburg testified that after finding out Thrasher had listed a false address on his registration sheet, he called the listed telephone number and spoke with someone who identified himself as Michael Thrasher. 8RP 13. After refusing to verify his address, Thrasher grew angry and told the detective to contact his attorney, so Vrandenburg got the attorney's contact information. 8RP 13-14. At this point, the following exchange

³ Counsel on appeal filed a motion asking that this portion of the transcript remain sealed but Thrasher directed counsel to withdraw the motion, evidently believing it was in his interest to have this information in the record. See Motion to Withdraw Motion to Seal Portion of Verbatim Report of Proceedings.

occurred:

Defense: Objection.

Vrandenburg: So I got his attorney's name and phone number.

Judge: Did you say something, Mr. Ewers?

Defense: Yeah, objection your honor.

Judge: Okay, well if you'd ask another question please Ms. Charlton.

Pros. What did Mr. Thrasher tell you next?

Vrandenburg: Well, what --- what he told me next --- he told me to call his attorney. So ---

Pros. How did you respond?

Vrandenburg: I said I would do that. So he gave me the attorney's name and phone number.

8RP 14. Counsel never stated a basis for his objection. And, although Thrasher's former attorney was mentioned several times in the ensuing discussion, Thrasher never again objected or requested a ruling on whether the testimony was proper. 8RP 14-24.

On cross-examination, defense counsel again touched on the detective's lack of familiarity with Thrasher by asking: "Other than your conversation with Mr. Thrasher, you never met him

before in person?" 8RP 23. The detective confirmed he had never met Thrasher. Id.

The prosecutor's closing argument focused on the fact that Thrasher had admitted the elements of the crime, that he had never told anyone that he had medical conditions that prevented registration, and that he could have registered if he had wanted. 8RP 99-106. In that argument, counsel mentioned Thrasher's lawyer a single time; she noted that it was not credible that Thrasher would failed to mention his illness if that was the true cause of his failure to register. The prosecutor noted that Thrasher could simply have said, "I'm sick, I --- I'm having a problem registering" 8RP 101.

- b. Review Should Be Barred By RAP 2.5(a) Because The Prosecutor's Questioning And Argument Were Not Error, Let Alone "Manifest" Error.

Reversal based on an alleged comment on the right to counsel is warranted only if there has been a manifest error affecting a constitutional right. RAP 2.5(a); State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006). The appellant has the burden to demonstrate "manifest" error, i.e., error that actually

affected his rights. State v. McNeal, 145 Wn.2d 352, 357, 37 P.3d 280 (2002) (quoting State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

The State may not comment on an accused's exercise of his Fifth Amendment right to remain silent or his right to counsel. See e.g. State v. Sweet, 138 Wn.2d 466, 480-81, 980 P.2d 1223 (1999); State v. Lewis, 130 Wn.2d 700, 705-06, 927 P.2d 235 (1996); State v. Crane, 116 Wn.2d 315, 804 P.2d 10 (1991). But, not all remarks about counsel or silence amount to a "comment" on the exercise of a constitutional right. Sweet, 138 Wn.2d at 481; Lewis, 130 Wn.2d at 706. The issue is "whether the prosecutor manifestly intended the remarks to be a comment on that right." Crane, 116 Wn.2d at 331. "A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." Lewis, 130 Wn.2d at 706-07. In Gregory, the prosecutor's comment that Gregory failed to contact police for three days before arrest, even though he knew police were looking for him, did not constitute a sufficient comment to warrant review absent an objection. 158 Wn.2d at 838-40.

So, too, this Court should refuse to review Thrasher's claim. Thrasher objected only briefly, did not state a basis for his objection, never obtained a ruling on the objection, and then never objected again to any testimony about Ellerby, to testimony about the telephone conversation, or to closing argument. This is simply insufficient to preserve the claim for review.

And, the prosecutor was justified in making some limited inquiry into Thrasher's mention of his right to counsel, in light of the fact that Thrasher had challenged the detective's knowledge that he was speaking to Thrasher on the telephone. CP 15-17; 2RP 24-27. By confirming that Thrasher provided a name and telephone number of a lawyer, the prosecutor strengthened the inference that it was actually Thatcher on the telephone, irrespective of the fact that the detective had never met Thatcher or heard Thatcher's voice. Thus, the prosecutor had an entirely proper purpose for her inquiry.

Moreover, the prosecutor's other purpose was not to penalize the exercise of Thrasher's right, but rather to illustrate that Thrasher never told the detective about his allegedly debilitating

medical conditions, under circumstances where one would expect him to mention those conditions. This inquiry was proper because Thrasher did not immediately invoke his right to counsel; rather, he ranted at the detective for some time and only *later* did he instruct the detective to call his lawyer. Under these circumstances, it cannot be said that the prosecutor's manifest purpose was to comment on Thrasher's right to silence or counsel. Instead, she was commenting on the peculiar fact that he said nothing about his medical ills. This was proper direct examination, especially in light of the emphasis that Thrasher placed on his medical condition, and his assertion that his crime was not "knowingly" committed due to his poor health. CP 18-19; 7RP 72.

When the subject arose on cross-examination of Thrasher, the prosecutor limited her question to whether Thrasher had ever told Vrandenburg "about all these medical issues you were having." Thrasher's answer exceeded the scope of the question. He said, "I told him I had (sic) no further conversations with him and he could contact my lawyer." 8RP 82. His lawyer did not object to this question or answer. Thrasher was, in effect, using his invocation of the right to counsel as a shield; he

should not now be permitted to use it as a sword.⁴ And, when the prosecutor mentioned the subject one time in closing argument, it was again clearly in the context of noting how strange it would be for Thrasher not to mention his health concerns if those were actually preventing him from registering.

Finally, review of this claim would be especially inappropriate since Thrasher had personally made it clear that he *wanted* to elicit testimony about Ellerby to show that he was not trying to hide from law enforcement. 7RP 32-33. His theory was that he had cooperated with the detective, but wanted the detective to deal with him through his lawyer. Thus, to the extent that the prosecutor elicited this testimony, the defendant invited the very same testimony pretrial, and it is reasonable to conclude that he asked his lawyer to refrain from objecting when the subject arose at trial.⁵ For these reasons, Thrasher should not be heard to complain for the first time on appeal. There has been no showing of error or "manifest" error.

⁴ The prosecutor's follow up questioning of Thrasher illustrates that her inquiry was limited to the medical issue. "But it's your testimony that these medical issues were preventing you from registering . . . And you didn't think that was important (sic) to tell Detective Vrandenburg?" Defendant: "Its really none of his business." 8RP 82.

⁵ This is consistent with what occurred on appeal, where counsel sought to seal information about Ellerby, but Thrasher instructed counsel to allow the information. See *supra*. footnote 3.

c. Even If This Court Finds Manifest Error, It Was Harmless Beyond A Reasonable Doubt.

Constitutional error stemming from a comment on the exercise of a constitutional right need not result in reversal if it can be said that the error was harmless beyond a reasonable doubt. State v. Pottorff, 138 Wn. App. 343, 156 P.3d 955 (2007) (any error harmless beyond a reasonable doubt). Any error here was harmless beyond a reasonable doubt.

Thrasher admitted that he knew about his general duty to register, 8RP 72, and that both addresses he had used to register were false. 8RP 73-75. He admitted that he did not register as "homeless" during this time, and that he was, in fact, living in a house in Kent with a friend on an open-ended basis. 8RP 79. He also admitted that he never made any effort to comply -- once he registered as homeless -- with the requirement that he report weekly at the King County Courthouse. 8RP 85. Thrasher admitted virtually every element of the crime, except to the extent that he claimed medical problems rendered his failure to register "unknowing." Under these facts, it is virtually certain that the

testimony about Ellerby did not affect the verdict. Overwhelming untainted evidence supported the jury's verdict.

2. TRIAL COUNSEL MADE A REASONABLE TACTICAL DECISION TO ARGUE THAT THRASHER'S MEDICAL ISSUES CAUSED A REASONABLE DOUBT AS TO "KNOWLEDGE," RATHER THAN ARGUING A "NECESSITY" DEFENSE THAT WAS UNSUPPORTED BY THE RECORD.

a. Facts.

Early on, it was clear that defense counsel, consistent with Thrasher's wishes, planned to show that Thrasher was very sick during the charging period. He planned to call a witness, Kyra Frias, at whose home Thrasher lived in April, 2008, who could testify to Thrasher's illnesses. 1RP 6-8.⁶ When the case was first assigned out to trial, on December 16, 2008, trial counsel argued to Judge Lum that Thrasher's medical records were relevant to show that Thrasher was seriously ill and immobile during the charging period, such that his failure to register was not a "knowing" violation of his duty to register. 2RP 8-10. Judge Lum ruled that the evidence would not be subject to a blanket exclusion because "the

⁶ That witness was available and ready to testify in January, 2009, but after Thrasher decided to go pro se and the case was continued, counsel lost contact with the witness and, when the case finally came on for trial in March, the witness could not be located. 7RP 65-66.

line between willful and knowing is extremely thin," 2RP 33, and the defense should be allowed to present its "theory of the case." Id. at 34. Months later, counsel confirmed that the defense was tied to the medical records and Judge North agreed that Thrasher could proceed with that defense. 7RP 57-71.

- b. A "Necessity" Defense Was No More Likely To Succeed For Thrasher Than Was A "Knowledge" Defense.

Thrasher argues that his right to effective representation was denied because his attorney did not propose a necessity instruction based on his medical difficulties. Br. of App. at 31-40. This claim must be rejected. Thrasher was not entitled to a medical necessity instruction under the facts of this case and, even if he was, counsel was not deficient in choosing the "knowledge" strategy over the "necessity" strategy. Nor can Thrasher establish that the jury would have returned a not-guilty verdict if provided with a necessity instruction.

To demonstrate ineffective assistance of counsel, Thrasher must satisfy both prongs of a two-prong test. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251

(1995). First, he must establish that his counsel's representation was deficient. State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To show deficient performance, he must shoulder the heavy burden of showing that his attorney made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. State v. Howland, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992). His attorney's conduct must have fallen below an objective standard of reasonableness given all the facts and circumstances. State v. Meckelson, 133 Wn. App. 431, 436, 135 P.3d 991 (2006). There is a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335. Second, Thrasher must show that his attorney's deficient performance resulted in prejudice such that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d at 78.

Thrasher says that his attorney's failure to propose a necessity defense instruction was deficient because a reasonably competent attorney would have proposed such an instruction under the facts of his case. An attorney's failure to propose an appropriate jury instruction can constitute ineffective assistance. State v. Cienfuegos, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001).

But, to establish ineffectiveness on this basis, Thrasher must show that he was entitled to the instruction. State v. Johnston, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007).

A necessity defense is very narrow. Its requirements are spelled out in the Washington Pattern Jury Instructions, Criminal, as follows:

Necessity is a defense to a charge of _____ if

- (1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and
- (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law; and
- (3) the threatened harm was not brought about by the defendant; and
- (4) no reasonable legal alternative existed.

The defendant has the burden of proving this defense by a preponderance of the evidence. . . . If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty [as to this charge].

WPIC 18.02 (Necessity—Defense).

Case law has made clear that the defense is appropriate only

when the physical forces of nature or the pressure of circumstances cause the accused to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from a violation of the law. The defense is not applicable where the compelling circumstances have been brought about

by the accused or where a legal alternative is available to the accused.

State v. Gallegos, 73 Wn. App. 644, 650, 871 P.2d 621 (1994)

(quoting State v. Diana, 24 Wn. App. 908, 913-14, 604 P.2d 1312 (1979)).

Thrasher would not have been entitled to a necessity instruction for several reasons. First, the instruction would have been pertinent only as to the allegation that he failed to report weekly, as required of homeless registrants. By registering using false addresses, Thrasher was guilty of the offense, regardless of whether he could make the trip to the courthouse, because he had a duty to register his true address.

Additionally, the law imposed no duty on Thrasher to travel to the courthouse unless he was registered as homeless. Because Thrasher had registered using an address, he could have changed that address by putting a form in the mail. His ability to travel was irrelevant as to the period when he claimed an address. See 7RP 48 (comments of Judge North). In short, a "reasonable legal alternative" existed. WPIC 18.02.

Even considering the period after June, 2008, when Thrasher had declared himself homeless, he did not establish that the forces of nature kept him from coming to the courthouse once a

week to avoid a greater societal harm. He had already come to the courthouse three times to change his address, strongly suggesting that his failure to come again was a lack of desire, not a medical necessity. While travel may have been difficult, Thrasher could not establish by a preponderance of the evidence that his medical condition left him bedridden or completely unable to travel by bus to the courthouse.⁷

Moreover, had counsel chosen to invoke an affirmative defense, he would have taken on an actual burden of proof, rather than simply attacking the state's failure to prove knowledge beyond a reasonable doubt. By simply aiming for a sympathy vote from one juror, or by asking the entire jury to find a lack of knowledge, counsel was able to place Thatcher's theory of the case before the jury without taking on the burden of proving the affirmative defense by a preponderance of the evidence.

Finally, invoking and testifying based upon a necessity defense may well have caused the trial court to revisit its decision

⁷ Any deficiency in the proof on this matter cannot be blamed on trial counsel. His lawyer had subpoenaed witnesses who were prepared to testify on the defendant's medical condition, but Thrasher derailed the plans by insisting on a continuance so that he could represent himself. In the meantime, contact with those witnesses was lost. 7RP 64-65.

to exclude evidence that Thrasher had previously been convicted of Failure to Register. 7RP 70-74. The court considered exclusion of that evidence to be a close call, and invoking a necessity defense may have tipped the balance in favor of admitting the prior conviction into evidence.

For these reasons, Thrasher has failed to show that his lawyer was deficient in failing to argue a defense that was doomed to fail under any facts and which was, to boot, not supported by the available evidence.

Finally, Thrasher cannot show prejudice; he cannot show any probability that a different strategy would have changed the result of this case. His claims of "necessity" were simply not credible. Most importantly Thrasher could have registered the Frias address and changed it, if necessary, by mail, so his medical condition seems barely relevant. Moreover, he listed his sister's address and his brother's address on medical discharge papers rather than any real address he was residing at. Although he initially spoke to Detective Vrandenburg without invoking his rights, he never said anything about medical difficulties. Nor did he ever claim medical difficulties on his trips to the courthouse to register or change addresses. In fact, Thrasher testified that in all the years

he had been required to register, he had never heard of anybody actually verifying addresses. This fact suggests that he thought nobody would check if he registered falsely.⁸

As the Washington Supreme Court said many years ago, "[T]he method and manner of preparing and presenting a case will vary with different counsel. The effectiveness or the competence of counsel cannot be measured by the result obtained. Some defendants are, in fact, guilty and no amount of forensic skill is going to bring an acquittal." State v. Thomas, 71 Wn.2d 470, 472, 429 P.2d 231 (1967).

The evidence against Thrasher was overwhelming, and his evidence of necessity was weak. He cannot establish that his lawyer was ineffective in choosing to forego the defense. Nor can he establish that counsel's choice would have made any difference in this trial.

⁸ Thrasher also admitted at sentencing that he had outstanding warrants during the spring of 2008, and that he was arrested and spent time in the Kent jail during this time. 9RP 12-13. This admission explains why Thrasher preferred to register false addresses, instead of registering his true address. After all, if he had registered his true Kent address, he would not have needed to travel to the courthouse, but he might have been arrested on warrants at that address.

D. CONCLUSION

For these reasons, the State respectfully asks this Court to affirm Thrasher's conviction.

DATED this 28th day of December, 2009.

Respectfully submitted,

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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 Elaine Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. MICHAEL THRASHER, Cause No. 63334-1-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.

U Brame

Name

Done in Seattle, Washington

12/28/09

Date 12/28/09