

NO. 65819-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

ABRAM VELIEZ,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Ira J. Uhrig, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his right to effective assistance of counsel.

Issue Pertaining to Assignment of Error

At trial, appellant admitted committing a single incident of misdemeanor theft, but denied committing the other thefts the State had to prove to convict him of committing "organized retail theft," a felony. Did defense counsel's failure to request jury instructions that would allow the jury to convict appellant of misdemeanor theft instead of felony theft constitute ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural History

On September 23, 2009, the Whatcom County Prosecutor charged appellant Abram Veliz with one count of second degree organized retail theft and one count of possession of heroin. CP 99-100; RCW 9A.56.350; RCW 69.40.4013(1). The prosecutor alleged that on five separate occasions between June 21, 2009 and September 18, 2009, Veliz stole various items from the same Bellingham Walmart store, and that following his arrest for the last theft on September 18th, he was found in possession of heroin. CP 97-98.

On October 22, 2009, Veliz pleaded guilty to one count of second degree theft and one count of heroin possession, and was sentence to 29 months of incarceration. CP 77-94. The guilty plea and resulting sentence were vacated five months later, however, due to a mutual mistake regarding Veliz's correct offender score. CP 73.

Veliz represented himself, with the assistance of stand-by counsel, following vacation of the guilty plea and sentence, until the eve of trial, when he requested stand-by counsel to take over. CP 72; RP 130.¹

A jury trial was held June 2-9, 2010, before the Honorable Ira J. Uhrig. RP. The jury found Veliz guilty as charged. CP 34.

On July 20, 2010, Veliz was sentenced to 38 months of incarceration. CP 16-26. He appeals. CP 3-15.

2. Substantive Facts

Christopher Onyon is an "Asset Protection Associate" for Walmart. RP 183. While at work on September 18, 2009, Onyon saw Veliz in the store and suspected he was the person depicted on store surveillance video stealing merchandise several times over the past several months. RP 284.

¹ There are five volumes of verbatim report of proceedings. Four of the five volumes are consecutively paginated and referenced collectively herein as "RP." The other volume, from a brief scheduling hearing before the Honorable Steven J. Mura on May 10, 2010, is not cited in this brief.

Onyon notified his supervisor, Justice French, and then surreptitiously followed Veliz through the store. RP 284-85.

Veliz eventually stopped in the girls clothing section, where Onyon saw him quickly select several clothing articles and put them in his shopping cart before proceeding to the men's clothing section. RP 285-88.

Onyon then saw Veliz produce a large JC Penneys shopping bag, into which he put all of the clothing he had taken from the girls' clothing section. RP 288-89. With Onyon following, Veliz then left the store without stopping to pay for the clothes. RP 290-91. Once outside the store, Onyon confronted Veliz by stepping in front of him and stating, "I'm Walmart security. I need to talk to you about the unpaid merchandise." RP 291. According to Onyon, Veliz pushed him and then ran into the parking lot. RP 291-94. Onyon and French chased Veliz down, took him to the ground following a brief struggle and placed handcuffs on him, after which Veliz became compliant. RP 294-97. Onyon recovered the bag of clothes and escorted Veliz back into the store to wait for police to arrive. RP 296-97.

Bellingham Police Officer Christopher Brown responded to Walmart to investigate Veliz's conduct. RP 332. After Onyon described what occurred that day, Brown arrested Veliz and advised him of his

rights. RP 335. In a search incident to arrest, several syringes, a spoon, Q-tips and heroin were found on Veliz. RP 342, 345-53, 383.

Veliz initially gave Brown false names, but eventually admitted that he was Abram Veliz. RP 336-38. Veliz also admitted to taking the clothes Onyon and French had caught him with. RP 339.

At some point during Brown's interrogation of Veliz, Onyon explained that he believed Veliz was responsible for a number of previous thefts from the store as well, and showed Brown the documentation he had compiled to support that belief. RP 340. When confronted by Brown with Onyon's documentation, Veliz allegedly admitted to stealing from the store on August 30, 2009, July 15, 2009, and July 7, 2009, but denied stealing anything on June 21, 2009. RP 340-41, 360.

The total value of items Onyon suspected Veliz of stealing between June 21, 2009 and September 18, 2009, is \$1407.56. RP 309, 342. The items taken on June 21, 2009, were three video cameras with a combined value of \$479.52. RP 187, 189, 225. The item taken on July 7, 2009, was another video camera valued at \$129.84. RP 228-30, 238. The items taken on July 15, 2009, consisted of five video games and a digital photo frame with a combined value of \$263.70. RP 246-47, 265. The item taken on August 30, 2009, was a multimedia recorder valued at \$299. RP

278. The girls clothing taken on September 18, 2009, was valued at \$235.50. RP 309.

In closing argument, defense counsel did not contest the drug charge at all, and concluded with:

The State has proven that on September 18th Mr. Veliz did commit a theft. He stole children's clothing. He was caught red-handed and admitted to that. But what the State cannot prove is that that person, the one that committed the thefts on September 18th is the same person that committed these very different types of thefts earlier in the summer. And therefore, because they cannot prove beyond a reasonable doubt those earlier thefts, you must acquit my client and you must find Mr. Veliz not guilty.

RP 474.

During deliberations, the jury submitted the following questions to the court:

What constitutes a legal confession? Is there a documented confession? Is the testimony of a confession from law enforcement officer considered evidence of such confession?

CP 35. The court responded by referring the jury to the instructions provided. Id.

C. ARGUMENT

VELIZ WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS COUNSEL FAILED TO PROPOSE A LESSER INCLUDED OFFENSE INSTRUCTION FOR THIRD DEGREE THEFT.

Defense counsel was ineffective for failing to propose a lesser included offense instruction for third degree theft where it was supported in both law and fact, and where the defense theory of the case admitted the commission of the lesser offense. Veliz was prejudiced by counsel's error and therefore reversal is required.

Veliz had the right to effective assistance of counsel at trial. U.S. Const. amend. 6; Const. art. 1, § 22. The invited error doctrine does not bar review of a claim of ineffective assistance of counsel. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999); State v. Gentry, 125 Wn. 2d 570, 646-47, 888 P.2d 1105 (1995); State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996). To prevail on an ineffective assistance claim, trial counsel's conduct must have been deficient in some respect, and that deficiency must have prejudiced the defense. Doogan, 82 Wn. App. at 188 (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

A defendant is entitled to a lesser included offense instruction if the proposed instruction meets the legal and factual “prongs” of the

Workman test. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The legal prong is met where each of the elements of the lesser offense are included within the elements of the greater offense, while the factual prong is met where the evidence supports an inference that only the lesser offense was committed. *Id.* On review of the factual prong, a court examines the evidence in the light most favorable to the party seeking the instruction. See State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

As charged here, a person is guilty of second degree organized retail theft if the person "wrongfully obtains or exerts unauthorized control over property from one or more mercantile establishments; within a period of 180 days, with intent to deprive the mercantile establishment[s] of the property, such property having a total cumulative value of at least \$750." CP 48 (Instruction 10); see also RCW 9A.56.350.² In comparison, a

² RCW 9A.56.350 provides:

- (1) A person is guilty of organized retail theft if he or she:
 - (a) Commits theft of property with a value of at least seven hundred fifty dollars from a mercantile establishment with an accomplice;
 - (b) Possesses stolen property, as defined in RCW 9A.56.140, with a value of at least seven hundred fifty dollars from a mercantile establishment with an accomplice; or
 - (c) Commits theft of property with a cumulative value of at least seven hundred fifty dollars from one or

person is guilty of third degree theft "if he or she commits theft of property or services which (a) does not exceed seven hundred fifty dollars in value, or (b) includes ten or more merchandise pallets, or ten or more beverage crates, or a combination of ten or more merchandise pallets and beverage crates." RCW 9A.56.050(1). Accordingly, the only significant difference in the legal elements between second degree organized retail theft and third degree theft is the value of the items taken, which must be under \$750 for third degree theft and over \$750 for second degree organized retail theft. All of the elements of third degree theft are therefore included within the crime of second degree organized retail theft and the former is a lesser included offense of the latter under the "legal" prong of Workman.

Veliz's counsel failed to propose instructions that would have allowed the jury to consider convicting him for the lesser included offense of third degree theft. This failure constitutes deficient performance because there was evidence supporting an inference that only the lesser

more mercantile establishments within a period of up to one hundred eighty days.

...

(3) A person is guilty of organized retail theft in the second degree if the property stolen or possessed has a value of at least seven hundred fifty dollars, but less than five thousand dollars. Organized retail theft in the second degree is a class C felony.

...

offense was committed. State v. Thomas, 109 Wn.2d 222, 227-28, 743 P.2d 816 (1987) (counsel's failure to request an involuntary intoxication instruction where the evidence supported it constituted ineffective assistance of counsel). Moreover, defense counsel's deficient performance prejudiced Veliz.

The facts here are similar to the facts in State v. Ward, 125 Wn. App. 243, 249-50, 104 P.3d 670 (2004). In Ward, this Court held counsel was ineffective for failing to request a lesser included instruction on unlawful display of weapon in an assault case. The Ward court reasoned that given the starkly different penalties for a felony assault and the misdemeanor offense unlawful display of weapon, and the importance the defendant's credibility played at the trial, the failure to request the lesser included instruction was not a legitimate trial strategy. 125 Wn. App. at 250. This Court commented that, "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." Id. It also found "[t]he all or nothing strategy exposed Ward to a substantial risk that the jury would convict on the only option presented, two second degree assaults." Id.

As in Ward, there is a stark difference in penalties between second degree organized retail theft and third degree theft. Veliz's standard range

sentence for second degree organized retail theft was 33-43 months. CP 17. For a third degree theft, however, the maximum sentence was only one year. RCW 9.92.020.³ Thus, the risk of *not* allowing the jury to consider third degree theft as an alternative offense was 21-31 months of incarceration.⁴

Moreover, defense attorney conceded in closing argument that Veliz was caught "red-handed" stealing the children's clothes on September 18th, arguing only that the State had failed to prove Veliz was the same person depicted in the various pictures and videos submitted at trial, and that his apparent confession to three of the four other thefts was merely an effort to garner leniency from Officer Brown. RP 464-74.

³ RCW 9.92.020 provides:

Every person convicted of a gross misdemeanor for which no punishment is prescribed in any statute in force at the time of conviction and sentence, shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than one year, or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine.

There does not appear to be any statute setting a different maximum term of confinement for third degree theft.

⁴ Assuming the jury would have convicted Veliz of third degree theft *and* the heroin possession charge, his minimum sentence would have been 12 months because even with one less offender score point, the standard range for the possession charge is 12-24 months. RCW 9.94A.517.

Thus, he was clearly guilty of at least a third degree theft. Given no other option but second degree organized retail theft, and despite some apparent skepticism about the reliability of Veliz's alleged confession,⁵ the jury likely opted to find him guilty of something rather than letting him evade all responsibility for his unlawful conduct. Ward, 125 Wn. App. at 250. The "all or nothing strategy" unreasonably exposed Veliz "to a substantial risk that the jury would convict on the only option presented," second degree organized retail theft. Id.

Under the circumstances, defense counsel's failure to propose a lesser included offense instruction for third degree theft constituted deficient performance that prejudiced Veliz. Therefore, this Court should reverse his conviction.

⁵ As previously noted, during deliberation the jury asked for clarification on what constituted a "legal confession." CP 35.

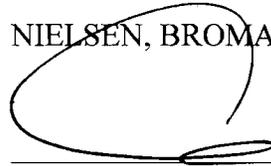
D. CONCLUSION

For the reasons stated herein, this Court should reverse Veliz's conviction.

DATED this 29th day of December, 2010.

Respectfully submitted,

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v.)	COA NO. 65819-1-I
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Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF DECEMBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] JAMES HULLBERT
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- [X] ABRAM VELIZ
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SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF DECEMBER, 2010.

x *Patrick Mayovsky*