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APR 01 2013

King County Prosecutor
Appellate Unit

NO. 68853-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

ERIK SCHUMANN,

Appellant.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2013 APR - 1 PM 4:13
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Kimberly Prochnau, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. VIEWED IN THE LIGHT MOST FAVORABLE TO SCHUMANN, THE FACTS SUPPORT A DEFENSE OF ABANDONMENT.....	1
2. INEFFECTIVE ASSISTANCE IS SHOWN BECAUSE THE COURT WAS LIKELY TO GIVE THE INSTRUCTION IF REQUESTED AND THE INSTRUCTION WAS LIKELY TO AFFECT THE JURY'S DECISION.	2
B. <u>CONCLUSION</u>	7

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Fernandez-Medina</u> 141 Wn.2d 448, 6 P.3d 1150 (2000).....	1
<u>State v. Gerdts</u> 136 Wn. App. 720, 150 P.3d 627 (2007).....	3
<u>State v. J.P.</u> 130 Wn. App. 887, 125 P.3d 215 (2005).....	4, 6
<u>State v. Montague</u> 10 Wn. App. 911, 521 P.2d 64 (1974).....	4
<u>State v. Ponce</u> 166 Wn. App. 409, 269 P.3d 408 (2012).....	2, 3, 4, 5, 6
<u>State v. Powell</u> 150 Wn. App. 139, 206 P.3d 703 (2009).....	3
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	6
<u>State v. Yates</u> 64 Wn. App. 345, 824 P.2d 519 (1992).....	3

FEDERAL CASES

<u>Strickland v. Washington</u> 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	3, 4
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A. ARGUMENT IN REPLY

1. VIEWED IN THE LIGHT MOST FAVORABLE TO SCHUMANN, THE FACTS SUPPORT A DEFENSE OF ABANDONMENT.

The State points to several facts that, it argues, undercut a defense of abandonment. Brief of Respondent (hereinafter “BoR”) at 9. This argument should be rejected because, in determining whether substantial evidence exists to warrant a jury instruction, the facts must be viewed in the light most favorable to the party requesting the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). Viewed in that light, the so-called facts discussed in page 9 of the State’s brief are not established by the record. The State argues the house was clearly not abandoned because Brunson was home when Schumann entered the house. BoR at 9. But the testimony establishes Brunson came home after being out most of the day and into the evening. 3RP 21. He went to the kitchen, had a brief meal, went downstairs, and heard Schumann already in his house. 3RP 21-22. The facts do not establish whether Schumann arrived while Brunson was eating or, as seems more likely, Schumann entered the house while Brunson was away and the house was, in fact, empty.

The State also asserts that at least one light was on when Schumann entered the house. BoR at 9. Again, the evidence does not establish this fact. Brunson testified he is very frugal, but turned on one light when he

came home that evening. 3RP 21. The record does not establish whether the light was on when Schumann arrived. But in light of Brunson's testimony about his frugality and that he only turned on one light when he came home, it is likely that before he returned home, there were no lights on. Viewed in the light most favorable to Schumann, the evidence shows that when Schumann arrived, the house was empty and unlit.

The State also argues the fact that Schumann wore gloves suggests he knew he was breaking the law. BoR at 9. But many different inferences could be drawn from the gloves, including that it was cold or that he did not wish to injure or dirty his hands. When correctly viewed in the light most favorable to Schumann, the fact of the gloves does not outweigh the evidence that the house appeared to be empty. See State v. Ponce, 166 Wn. App. 409, 416, 269 P.3d 408 (2012) (despite "substantial countervailing evidence," evidence supported instructing jury on permissible entry).

2. INEFFECTIVE ASSISTANCE IS SHOWN BECAUSE THE COURT WAS LIKELY TO GIVE THE INSTRUCTION IF REQUESTED AND THE INSTRUCTION WAS LIKELY TO AFFECT THE JURY'S DECISION.

There is a reasonable probability, sufficient to undermine confidence in the outcome, that if the jury had been instructed on the law applicable to the defense theory of the case, it would have found reasonable doubt and acquitted Schumann. To demonstrate ineffective assistance of counsel,

Schumann need only show a reasonable probability the outcome of the proceedings would have been different. Strickland v. Washington, 466 U.S. 688, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Powell, 150 Wn. App. 139, 157, 206 P.3d 703 (2009). Based on the evidence and the law, there is at least a reasonable probability the court would have instructed the jury on the abandonment defense if it had been requested. It is also reasonably probable the instruction would have impacted the outcome of the trial because the remaining instructions did not mention the significance of abandonment and, in closing argument, the prosecutor argued abandonment had no legal import.

The State argues there can be no prejudice because the court was not required to give the instruction. BoR at 11-12 (citing Ponce, 166 Wn. App. at 411. First, there are very few instructions a court must absolutely give a jury. See, e.g., State v. Gerdts, 136 Wn. App. 720, 727, 150 P.3d 627 (2007) (“In a criminal case, the trial court must instruct the jury that the State has the burden to prove each essential element of the crime beyond a reasonable doubt.”). The general rule is that the court must give an instruction if requested when the instruction is supported by the law and the evidence and is necessary to allow a party to fully argue its theory of the case. State v. Yates, 64 Wn. App. 345, 351, 824 P.2d 519 (1992). Thus many, if not most,

instructions are subject to the trial judge's assessment and discretion regarding the parties' theories of the case and the evidence presented.

The question, under Strickland, is whether there is a reasonable probability the court would have given the instruction if requested. See Strickland, 466 U.S. at 694 (“The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”). The answer is yes. The abandonment defense to burglary is supported by the law, as established by State v. J.P., 130 Wn. App. 887, 894-95, 125 P.3d 215 (2005). Division Three of this Court recently reaffirmed that law, declaring, “The conclusion [from J.P.] continues to appear inescapable.” Ponce, 166 Wn. App. at 418. As discussed above, the evidence also supported a jury instruction on abandonment. Even if an instruction on what is not a crime is not required, “A court may do so in the interest of clarity.” State v. Montague, 10 Wn. App. 911, 917, 521 P.2d 64 (1974). An instruction on abandonment would have permitted Schumann to fully and clearly argue his theory of the case. Therefore, there is at least a reasonable probability the court would have given it if requested.

The next question, under Strickland, is whether there is a reasonable probability this instruction would have made a difference in the jury's decision. The answer, again, is yes. Unlike Ponce, Schumann was

prejudiced by the lack of instruction on his defense because that defense was not implicitly incorporated in the remaining jury instructions and the State explicitly argued against the existence of the defense.

Ponce was charged with burglary and raised a defense that he reasonably believed the owner would have licensed his entry. Ponce, 166 Wn. App. at 413. The court denied his request for an instruction that this belief negated the element of unlawfully entering or remaining. Id. at 414-15. In finding no prejudice from the failure to give the instruction, the court noted the element of unlawfully entering or remaining was already defined for the jury. Id. at 420. The instruction defines unlawful entry or remaining, in part, as the absence of a license to enter or remain. Id. Because unlawful entry is defined in terms of the lack of license, it was unnecessary to give the jury a separate instruction that a license would be a defense. Id.

But Schumann's defense was not a license to be on the premises. His defense was that the premises were abandoned. 3RP 139. The State is correct that the same definition of unlawful entry was given in this case, but that is immaterial. Unlawful entry is not defined in terms of whether the premises are abandoned. CP 34. The jury instructions given in Schumann's case made no reference to whether the premises were abandoned. The jury had no way of knowing, based on the instructions, what to make of this argument, as none of the instructions tied it to an element of the offense.

Instruction on the defense of abandonment was also more crucial in this case than in Ponce because the prosecutor in Schumann's case argued against defense counsel's description of the law. 3RP 144-45. In finding no prejudice in Ponce, the court also noted, "the State never denied its obligation to prove that Mr. Ponce did not reasonably believe he was permitted to be in the shop." 166 Wn. App. at 420. Essentially, the State did not dispute the assertion that Ponce's reasonable belief would be a defense. Instead, it argued the evidence did not support that defense. Id. at 421.

By contrast, here, the prosecutor expressly argued in rebuttal that Schumann's defense theory did not matter, that regardless of whether he believed the premises were abandoned, he still intended to commit a crime. 3RP 144-45. This argument directly contradicted the law as stated in J.P. 133 Wn. App. at 894-95. Without a jury instruction on abandonment, counsel was left in the position of having to convince the jury what the law was. This was prejudicial error. See State v. Thomas, 109 Wn.2d 222, 228, 743 P.2d 816 (1987) ("Defendant is entitled to a correct statement of the law and should not have to convince the jury what the law is.").

The defense presented substantial evidence supporting the defense that Schumann reasonably believed the premises to be abandoned. That belief negates the essential element of intent to commit a crime. Ponce, 166 Wn. App. at 418; J.P., 133 Wn. App. at 894-95. Properly instructed, there

was at least a reasonable probability the jury would have found reasonable doubt as to Schumann's intent. But the jury did not receive such an instruction because counsel did not request it. This was deficient performance that deprived Schumann of his constitutional right to effective assistance of counsel.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Schumann requests this Court reverse his conviction.

DATED this 15th day of April, 2013.

Respectfully submitted,

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STATE OF WASHINGTON)	
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v.)	COA NO. 68853-7-1
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ERIK SCHUMANN,)	
)	
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 1ST DAY OF APRIL, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ERIK SCHUMANN
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SIGNED IN SEATTLE WASHINGTON, THIS 1ST DAY OF APRIL, 2013.

X *Patrick Mayovsky*