

original

FILED
COURT OF APPEALS
DIVISION II

NO. 36378-0-II

08 JAN 16 PM 3:23

STATE OF WASHINGTON
BY [Signature]
DEPUTY

RECEIVED
JAN 16 2008
KITSAP COUNTY
PROSECUTING ATTORNEY

WASHINGTON STATE COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KURT POUST,

Appellant.

APPELLANT'S BRIEF

JOHN L. CROSS
Attorney for Appellant
559 Bay St.
Port Orchard, WA 98366
(360) 895-1555

ORIGINAL

TABLE OF CONTENTS

I.	ASSIGNMENT OF ERROR.....	1
II.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
III.	STATEMENT OF THE CASE.....	1
	A. Procedural History.....	1
	B. Facts.....	2
IV.	ARGUMENT.....	4
	A. Theft by Deception.....	5
	B. Under a proper statement of the law, the evidence was I insufficient to establish guilt beyond reasonable doubt.....	6
	C. Trial counsel’s failure to object to the erroneous instructions constitutes ineffective assistance of counsel.....	9
V.	CONCLUSION.....	12

TABLE OF AUTHORTIES

Cases

<i>State v. Barnes</i> 153 Wn.Id 378, 382, 103 P.3d 1219 (2005).....	5
<i>State v. Burnham</i> 19 Wn.App. 442, 444, 576 P.2d 917 (1978).....	6,8
<i>State v. Vargas</i> 37 Wn.App 780, 683 P.2d 234 (1984).....	6
<i>State v. Mercey</i> SS Wn.2d 530, 348 P.2d 978 (1960).....	6
<i>State v. Reid</i> 74 Wn.App. 281, 872 P.2d 1135 (1999).....	6,9
<i>State v. O'Dell</i> 46 Wn.2d 206, 279 P.2d 1087.....	7,8
<i>State v. Vargas supra</i>	8
<i>Accord State v. Alcantra</i> 87 Wn.2d 393, 552 P.2d 1049 (1976).....	9
<i>Strickland v. Washington</i> 466 U.S.668, 686-87, 104 S.Ct 2052, 80 L.Ed 2d 679 (1984).....	10,12
<i>State v. Aho</i> 137 Wn.2d 736, 745, 975 P.2d 512 (1999).....	10
<i>State v. Garrett</i> 124 Wn.2d 504, 520, 881 P.2d 185 (1984).....	10
<i>State v. Cienfuegos</i> 144 Wn.2d 222, 229, 25 P.3d 1011 (2001).....	10
<i>State v. Townsend</i> 142 Wn.2d 838, 843 15 P.3d 145 (2001).....	10
<i>State v. Stein</i> 144 Wn.2d 236, 240, 27 P.3d 184 (2001).....	10

In re Winship

397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed 2d 368 (1970).....12

Statutes

RCW 9A.56.020(1)(b).....passim

I. ASSIGNMENTS OF ERROR

1. The trial court erred by giving jury instruction #6. (CP159)
2. The trial court erred by giving jury instruction #7. (CP160)
3. The trial court erred by giving jury instruction #8. (CP161)
4. The trial court erred by denying post-trial motions in arrest of judgment and for new trial.
5. The trial court erred by entering judgment of guilt when evidence was insufficient.
6. The trial court erred by entering judgment of guilt when Mr. Poust received ineffective assistance of counsel.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the “to convict” jury instructions (#6, 7 and 8), misstate the law and mislead the jury.
2. Whether there was sufficient evidence to establish beyond a reasonable doubt the “deception” element of theft by deception.
3. Whether failure to object to erroneous jury instructions constitutes ineffective assistance of counsel in violation of the constitution of the United States and the State of Washington.

III. STATEMENT OF THE CASE

A. Procedural History

On August 12, 2005, Kurt Alan Poust was charged by Information with one count of Theft in the First Degree (CP1). On

October 17, 2005, Mr. Poust appeared and pled not guilty. (CP26)
His release was conditioned on posting \$5000.00 bail. (CP24)
Trial was set for December 12, 2005. (CP21).

Several continuances were had, resulting in a trial date of
January 30, 2007. (VRP1). During that time, Mr. Poust retained
private counsel. (CP52). Also, on September 1, 2006, the state
filed its First Amended Information which alleged three additional
counts of theft and one count of unlawful Issuance of a Bank
Check. (CP81). Notably, only Count I of the First Amended
Information alleged theft by "color of aid of deception." (CP81).

Again, just before trial, the State amended the charges.
The Second Amended Information alleged three counts of Theft in
the First Degree. (CP98). Again, only the first count alleged theft
by "color of aid of deception." (CP98-101).

Trial commenced on January 30, 2007. (VRP4). On
January 31, 2007, the jury returned guilty verdicts as to all three
counts. (CP171). Before sentencing, Mr. Poust filed a Motion,
Affidavit and Memorandum for Order Granting a New Trial.
(CP175-179).

Mr. Poust's motions were denied at a hearing held on May
18, 2007. (VRP (2/16/07) 7). That day, judgment and sentenced
was entered. (CP189-198). Later, on June 1, 2007, the trial court
stayed imposition of sentence pending appeal. (CP205). This
appeal was filed on June 1, 2007.

B. Facts

The case involved Mr. Poust's activities as a general
contractor doing business as All Points Construction. (VRP).

The three counts of theft result from three transactions in that capacity. Each customer had hired All Points Construction. Each gave an advance payment to cover planning, permitting and material. The three projects were not completed by All Points Construction. Each customer lost contact with All Points Construction. They never received an accounting of their advance payments nor any explanation for the disappearance of Mr. Poust.

Customer Leslie Reynolds-Taylor sought Mr. Poust's company for a remodel on her house. (VRP10). She had researched his credentials and found him to be licensed and bonded (VRP16-17). Ms. Reynolds-Taylor met with Mr. Poust, discussed the project, and advanced \$3146.50. Thereafter, she had contact with another person from All Points Construction. (VRP22). In time, the contact ended; she received no further information from All Points Construction regarding her project.

Similarly, Charles McDowell sought Mr. Poust's services to rebuild a deck. (VRP34-36). He met with Mr. Poust on August 13, 2003, entered a contract with All Points Construction and advanced \$2588.65 for materials. (VRP36-40). McDowell testified that the work never started and he received no communication from All Points Construction. (VRP44).

Finally, Patricia Ann Nervik hired Mr. Poust for a remodel on her house. (VRP49). This project required planning work, architect design, engineering, and permitting. (VRP50). On July 30, 2003, Ms. Nervik advanced \$10,500.00 for architectural work and permitting. (VRP52-54). Later, she had a meeting with the architect. (VRP54). Later, in August, 2003, Ms. Nervik learned

that Mr. Poust had left town. (VRP55-56).

Mr. Poust testified at length about his experience and business practices. (VRP63-123). He was licensed as a general contractor, insured and bonded. (VRP63). He employed as many as forty workers. (VRP63).

Mr. Poust spoke specifically about his contacts with the State's witnesses. Regarding Ms. Reynolds-Taylor, Mr. Poust detailed the work actually done on the project: hiring an architect and planning and budgeting the project. (VRP68-et.seq.). He similarly detailed his contact with and the work done for Mr. McDowell. (VRP83et.seq.) and Ms. Nevik (VRP80et.seq.).

In August, 2003, Mr. Poust had a falling out with his recent business partner, Larry Wisnewski. (VRP87-88). Wisnewski threatened Mr. Poust over money. (VRP89). Apparently, the dispute arose from a payroll check that bounced. (VRP90). Over several days, the threatening continued and Mr. Poust was advised by another employee that he should not go home. (VRP91).

In response to this situation Mr. Poust became afraid for his safety and left town. (VRP98-99). He left most of his belongings behind and fled to Oregon. (VRP99-100).

Mr. Poust testified that he believed these contracts would be fulfilled. (VRP104). He had in fact begun work on all three before he fled. Id. Also, while in Oregon, he had checked an "L and I" website and believed that each of the three complaining witnesses had received a \$12,000.00 pay-out from his bond. (VRP100).

IV. ARGUMENT

A. Theft By Deception

The issues raised in this appeal all follow from the giving of jury instructions 6, 7 and 8. (CP159-161). Each of these “to convict” instructions stated that an element of theft is proven if Mr. Poust, by color or aid of deception, obtained control over property of another. Each allowed that these acts could have occurred over a span of time: #6, August 13, 2003 to August 11, 2005; #7, May 9, 2003 to August 11, 2005; #8, July 1, 2003 to August 11, 2005. Instructing the jury to consider a span of time with regard to the deception element misstates the law of theft and was, therefore, erroneous. Generally, jury instructions are adequate if they allow a party to argue his theory of the case and do not mislead the jury or misstate the law. State v. Barnes 153Wn.2d 378,382, 103 P.3d 1219 (2005).

Under RCW 9A.56.020(1)(b), deception must occur at the time the property is obtained, not at some time in the future. The plain language of the statute so requires:

By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services. RCW 9A.56.020(1)(b).

The language clearly requires that the deception be extent at the time of the obtaining. The deception is used to obtain the property.

In light of Washington case law, the requirement of RCW 9A.56.020(1)(b) that there be contemporaneous deception and obtaining is not surprising. Under prior law, larceny required

contemporaneous act and intent. State v. Burnham 19 Wn.App 442, 444, 576 P.2d 917 (1978) (that the defendant act with intent) State v. Vargas 37 Wn.App 780, 683 P.2d 234 (1984) (common law elements not included in statutory scheme). See e.g. State v. Mercey SS Wn.2d530, 348 P.2d 978 (1960) (required that defendant obtained property from the prosecuting witnesses under false pretenses). Further, State v. Reid 74 Wn.App 281, 872 P.2d 1135 (1999) a case involving an erroneous inference instruction, makes the point. There, it was held improper to instruct a jury that it might infer intent to deprive by the mere fact of lengthy retention of property. The infirmity lies in that the prosecution is relieved of the burden of proving intent to deprive at the time of obtaining the property.

The present case has parity. The infirm instructions allowed inference of intent occurring after the time Mr. Poust obtained money from the state's witnesses. And, thus, a jury could find guilt merely because of the ultimate failure to perform the contract.

B. Under a proper statement of the law, the evidence was insufficient to establish guilt beyond a reasonable doubt.

It is established above that, properly understood, the law of theft by deception requires concurrence of the deception and the taking of the money. The evidence in this case falls short of establishing that requirement beyond a reasonable doubt in violation of constitutional due process.

The testimony of each of the complaining witnesses is nearly identical. Each sought out Mr. Poust for a construction

project. Each met with Mr. Poust. Each hired Mr. Poust and forwarded funds to begin each project. None related facts indicating any deception in these transactions. The only actionable fault was that the contracts were not performed.

No evidence in the case supported the notion that Mr. Poust in fact personally profited from the advanced funds. The State, which had the burden of proof as to all elements, did not establish the disposition of the funds. The State presented no evidence proving that the loss of funds was the result of thieving intent. That is, the State presented no evidence rebutting Mr. Poust's testimony that his business failed much later when he fled in fear. The State's case has no fact establishing deception or intent to deprive besides the mere failure of performance on the construction contract.

A 1955 theft by bad check case is illustrative. In State v. O'Dell, 46 Wn.2d 206, 279 P.2d 1087, the court considered the failure of the State to prove that the defendant had prepared the entire check. Since the State failed to adequately prove its handwriting exemplars, the evidence of check fraud was insufficient. Id. at 210. The Court said:

Proof of endorsement and presentment of a check, which check is later returned because of insufficient funds, does not directly or circumstantially prove that the endorser knew the drawer of the check was not authorized to draw it. It fails to meet the test of acceptable circumstantial

evidence, because the facts so shown are not inconsistent with the hypothesis that the endorser believed the check to be good and was himself victimized by the drawer.

The present case is similar. Here, without some evidence of deception at the time of contract, as observed, the State has none performance thereon only. As in State v. O'Dell where mere presentment of an NSF check is insufficient, mere failure to perform a construction contract should similarly be insufficient. The facts of the present case are not inconsistent with the hypothesis that Mr. Poust intended to perform at the time of contract. The nonperformance could be for many not felonious reasons; death, bankruptcy, theft of business equipment or information, etc. On the evidence here presented, any legitimate business that fails to perform a contract after an advance of funds would be liable for theft prosecution.

The Court of Appeals in State v. Burnham, supra found a similar problem; lack of proof of intent at the time of taking. 19 Wn.App at 444. Although Burnham was aptly criticized in State v. Vargas, supra, for importing a common law principle in to the statutory scheme, the court's conclusion still applies. Burnham had taken two radios from a boat. Id. at 443. He was caught trying to pawn the radios. Id. at 443-44. He was prosecuted under RCW 9A.56.020(1)(9). Id. The court disapproved of an instruction advising the jury that intent to return the property is no defense. Id. At 445. The court held that "a showing that defendant acted only with the intent to borrow the property is not sufficient

to support conviction.” 19 Wn.App at 445.

By implication, this proposition covers situations where a promise to return the borrowed property goes unfulfilled. So the court found in State v. Reid, supra. There, the court held that “[r]etention of a loaned item of property, without more, does not indicate a fraudulent intent even if the property is retained for a long time.” 74 Wn.App. at 287. Once again, the focus is on intent at the time of taking. The subsequent passage of time does not, alone, even “a long time,” prove intent. Accord State v. Alcantra 87 Wn.2d 393, 552 P.2d 1049 (1976) (mere retention of rented property past due date insufficient to allow inference of intent).

These principles fit the present case. The erroneous instructions allowed the jury to infer intent at the time of obtaining the funds from the failure to perform or the mere passage of time. The State’s case rested completely on just this premise. Thus, when any already retained business later fails, guaranteeing none performance and, obviously, the passage of “a long time,” intent to deceive is presumed.

The cases establish that this is not a rational inference. Thus, such an inference should not be taken in light favorable to the State. Nor should it support a finding that any rational jury could so find. The erroneous instructions herein allow conviction on insufficient evidence.

C. Trial counsel’s failure to object to the erroneous instructions constitutes ineffective assistance of counsel.

A claim of ineffective assistance of counsel implicates the constitutional guarantee to the assistance of counsel. United

States Constitution, amendment VI; Washington Constitution, article I, section 22. The test for ineffective assistance is clear: an appellant must show both (1) deficient performance by counsel and (2) that that deficiency deprived the defendant of a fair trial with a reliable result. Stickland v. Washington, 466 US.668, 686-87, 104 S.Ct. 2052, 80 L.Ed 2d 679(1984); See State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Deficient performance is not shown if the complained of failure goes to trial strategy or tactics. Strickland, *supra*; State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Further, the prejudice prong requires a showing that but for counsel's error, there is reasonable probability the result of trial may have been different; is that probability sufficient to undermine confidence in the outcome. See, State v. Cienfuegos, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001). Moreover, a reviewing court will presume the effectiveness of counsel. See, State v. Townsend, 142 Wn.2d 838, 843, 15 P.3d 145 (2001).

Yet a further requirement may attend the present case. Trial counsel did not object to the instructions. Thus, it can be said that the present issue is raised for the first time on appeal. However, such is allowed if the issue satisfies RAP 2.5(a)(3) (manifest error affecting a constitutional right"). "An error is manifest when it has practical and identifiable consequences in the trial of the case." State v. Stein, 144 Wn.2d 236, 240, 27 P.3d 184 (2001).

Here, Mr. Poust asserts his right to counsel pursuant to both the United States and Washington constitution. He clearly

asserts an issue of constitutional magnitude. Is this issue “manifest”? Mr. Poust’s arguments above show that the erroneous instructions in fact had practical and identifiable consequences in this trial. Thus, the present issue satisfies RAP2.5(a)(3).¹

Trial counsel was asked by the trial court for comment on the State’s proposed instructions. (VR P92). Counsel responded that the instructions were sufficient. *Id.* The court so instructed the jury (VRP 127). After trial, counsel asserted awareness of the erroneous instructions in post-trial motions. (CP178). Counsel in closing argued at length that deception must attend the act of obtaining the funds. (VRP 143-148).

From this, then, it appears that the jury instructions taken as a whole allowed Mr. Poust to argue his theory of the case. However, this concession serves to underline the difficulty caused by the failure to object to the “to convict” instructions. The misstated law served to undermine the very theory that counsel wished the jury accept. In addition, the inconsistency of counsel’s argument with the instructed law could easily confuse a jury of laypersons.

¹We note further that this issue was in fact raised below in Mr. Poust’s post-trial motions.

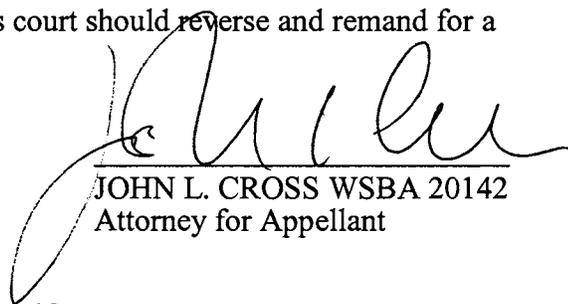
The deficiency of counsel's performance should be shown by the mere failure to object to demonstrably erroneous instructions. But this deficiency is the more severe in light of the effect on counsel's argument. Moreover, it cannot be said that allowing erroneous instructions on the law to undermine the defense theory of the case constitutes sound trial strategy or tactics. Deficient performance under Strickland is shown.

But did the deficiency cause prejudice to Mr. Poust? As argued above, these instructions were erroneous and may have resulted in a verdict of guilty based on insufficient evidence.

More precisely, they may have relieved the State of its burden of proof with regard to the intent element. See In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed 2d 368 (1970) (state must prove each element beyond a reasonable doubt). Had the jury been properly instructed that Mr. Poust must have intended deception at the time of the contracts, the result could well have been different. The error of law herein shows prejudice to Mr. Poust's right to a fair trial.

V. CONCLUSION

Mr. Poust has shown an error of constitutional magnitude. An error of law in instructing the jury, not objected by counsel, undermined his case theory and may have resulted in an erroneous conviction. Mr. Poust's post-trial motions should have been granted. In any event, this court should reverse and remand for a new trial.



JOHN L. CROSS WSBA 20142
Attorney for Appellant

RECEIVED
JAN 16 2008
KITSAP COUNTY
PROSECUTING ATTORNEY

WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,
Respondent,
KURT POUST
Appellant.

NO. 36378-0-II
DECLARATION OF SERVICE BY HAND

FILED
COURT OF APPEALS
DIVISION II
08 JAN 16 PM 3:23
STATE OF WASHINGTON
BY DEPUTY

RACHELLE DOYLE declares as follows:

On Wednesday January 16, 2008, I delivered by hand, to
following:

KITSAP COUNTY PROSECUTORS OFFICE
614 DIVISION ST
PORT ORCHARD, WA. 98366

Copies of the following documents: APPELLANT'S BRIEF
I declare under penalty of perjury under the laws of the
State of Washington the foregoing is true and correct.
DATED this 16th day of January, 2008


RACHELLE DOYLE

Original filed with:
WASHINGTON STATE COURT OF APPEALS, DIVISION II
950 BROADWAY SUITE 300
TACOMA, WA 98402

DECLARATION OF SERVICE
JOHN CROSS
DAVID LACROSS
ATTORNEYS AT LAW
559 BAY ST
PORT ORCHARD, WA 98366
360-895-1555