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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 36766-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Mark Jensen,

Appellant.

Clallam County Superior Court

Cause No. 07-1-00267-6

The Honorable Judge George L. Wood

Appellant's Reply Brief

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ARGUMENT

I. AN ERROR IN THE INSTRUCTION ON ABANDONMENT REQUIRES REVERSAL OF MR. JENSEN'S BURGLARY CONVICTION.

In *Bremerton v. Widell*, the Supreme Court noted that abandonment negates the element of unlawfulness required for a criminal trespass conviction. Abandonment is thus not an affirmative defense; the state must disprove abandonment to secure a conviction. *City of Bremerton v. Widell*, 146 Wn.2d 561, 51 P.3d 733 (2002). In *State v. J.P.*, the Court of Appeals applied the Supreme Court's reasoning in *Bremerton v. Widell* and extended the defense of abandonment to burglary charges. *State v. J.P.*, 130 Wn.App. 887 at 895, 125 P.3d 215 (2005). Nothing in either *Widell* or *State v. J.P.* limits application of the statutory defense to one kind of burglary over another. The state's assertion that the Court of Appeals in *State v. J.P.* "limited the applicability of RCW 9A.52.090 to residential burglary" is unsupported. Brief of Respondent, p. 2.

The state may not challenge the trial judge's decision to instruct the jury on abandonment. Unchallenged oral findings are verities on review. *State v. Shaver*, 116 Wn. App. 375 at 380, 65 P.3d 688 (2003). Respondent did not assign error to the trial court's oral finding that the evidence was sufficient for an abandonment instruction. RP (8/2/07) 19-

28. Having failed to assign error, the state cannot challenge the decision to give the instruction.

Even if Respondent were permitted to challenge the court's oral finding, the trial judge's decision must be upheld. A trial court's choice of instructions is reviewed for abuse of discretion. *State v. Motter*, 139 Wn. App. 797 at 806, 162 P.3d 1190 (2007); *State v. Chase*, 134 Wn. App. 792 at 803, 142 P.3d 630 (2006). Evidence is viewed in the light most favorable to the instruction's proponent, and the trial court's decision must be affirmed unless it is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. *State v. Fernandez-Medina*, 141 Wn.2d 448 at 455-456, 6 P.3d 1150 (2000); *Olver v. Fowler*, 161 Wn.2d 655 at 663, 168 P.3d 348 (2007).

Judge Wood was in the best position to evaluate the evidence; he determined that an abandonment instruction was appropriate. This is not a view that "no reasonable person would take." *Olver v. Fowler*, at 663, *internal quotation marks and citations omitted*. Accordingly, Judge Wood's decision to give an abandonment instruction should be upheld. His decision to limit the instruction to the crime of trespass was an error of law. *State v. J.P.*, *supra*. The conviction must be reversed and the case remanded for a new trial. *State v. J.P.*, *supra*.

II. IF DEFENSE COUNSEL IS RESPONSIBLE FOR THE ERROR IN THE COURT'S INSTRUCTIONS, MR. JENSEN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

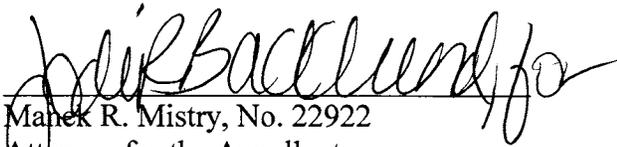
Respondent argues that an abandonment instruction was inappropriate, but does not suggest that Mr. Jensen received effective assistance of counsel if such an instruction were appropriate. The ineffective assistance claim therefore turns on the appropriateness of an abandonment instruction—an issue foreclosed by the state's failure to assign error to the trial court's oral findings, as outlined above. Because of this, Mr. Jensen rests on the argument set forth in his opening brief and in the previous section.

CONCLUSION

The trial court found that sufficient evidence supported an abandonment defense. The state has not assigned error to the court's oral finding, and cannot now challenge the trial judge's decision to instruct the jury on abandonment. Because the court's instruction improperly limited the defense to trespass, Mr. Jensen's burglary conviction must be reversed and his case remanded for a new trial.

Respectfully submitted on May 8, 2008.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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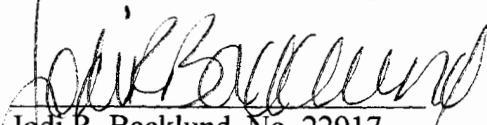
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on May 8, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 8, 2008.



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