

ORIGINAL

No. 36766-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARK JENSEN,

Appellant.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
BY DEPUTY

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable George L. Wood, Judge
Cause No. 07-1-00267-6

BRIEF OF RESPONDENT

CAROL L. CASE
Deputy Prosecuting Attorney
Attorney for Respondent
WSBA # 17052

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APPELLANT'S ASSIGNMENT OF ERROR

1. Defendant claims that the trial court erred by giving an erroneous instruction on the defense of abandonment.
2. Defendant claims that the trial court erred by giving Instruction No. 20, which reads as follows:

It is a defense to a charge to CRIMINAL TRESPASS IN THE FIRST DEGREE that a building involved in the trespass was abandoned.

The State has the burden of proving beyond a reasonable doubt that the trespass was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

Court's Instruction to Jury, No. 20, Supp. CP.

3. Defendant claims that if the instructional issue is not preserved for review, he was denied effective assistance of counsel.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erroneously instructed the jury that the defense of abandonment applied only to the lesser included offense of trespass but not to the burglary charge? Assignment of Error Nos. 1, 2.
2. Whether defendant was denied effective assistance of counsel because his counsel failed to object to the trial court's instruction on abandonment and because his counsel failed to propose a proper instruction on the defense of abandonment? Assignments of Error Nos. 1, 2, 3.

STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), the State accepts defendant's recitation of the procedural and substantive facts set forth in his opening brief at pages 2 through 3.

ARGUMENT

1. **THE TRIAL COURT DID NOT ERRONEOUSLY RESTRICT THE DEFENSE OF ABANDONMENT TO THE LESSER OFFENSE OF TRESPASS AS THE DEFENSE OF ABANDONMENT WAS NOT APPROPRIATE FOR THE BURGLARY SECOND DEGREE CHARGE.**

Defendant's reliance on *State v. J.P.*, 130 Wn.App. 887, 125 P.3d 215 (2005) is misplaced. Defendant claims that "RCW 9A.52.090, which provides a defense to the crime of criminal trespass, is also applicable to burglary cases." (Defendant's brief at page 4). The court limited the applicability of RCW 9A.52.090 to residential burglary without addressing any other degree of burglary. It is reasonable to suppose that the court's intention to address other degrees of burglary would have been expressly stated and not left to inference and conjecture.

"Abandoned" is not defined by RCW 9A.52.090, .070. Undefined statutory terms are given their usual and ordinary meaning as may be found in the dictionary. *State v. Sunich*, 76 Wn.App. 202, 206, 884 P.2d 1 (1994). "Abandon" is defined as "to cease to assert or exercise an interest, right, or title to esp[ecially] with the intent of never again

resuming or reasserting it” and “to give up . . . by leaving, withdrawing, ceasing to inhabit, to keep or to operate often because unable to withstand threatening dangers or encroachments.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2 (1993). “Abandoned” is defined as “given up”: DESERTED, FORSAKEN << (abandoned child> << an [abandoned] house>.” *Id. State v. J.P.* at 895-96

In the instant case, the owner of Mama’s restaurant reported the burglary in progress. RP (8-01-2007) 65, 75 He still had supplies and equipment in the restaurant. RP (8-1-2007) 53, 56, 58, 85. He had keys to the restaurant. RP (8-01/2007) 62, 66, 84-85, 130-31, and he did not give the defendant permission to enter or remain at Mama’s restaurant. RP (8-01-2007) 62. It is obvious that the business was not abandoned and the instruction for abandonment as a defense should not have been given for either trespass or burglary.

A reasonable trier of fact could infer that the defendant was not licensed, invited, or privileged to enter or remain at Mama’s restaurant. Because the business was not in operation at the time of the unlawful entry does not mean it was abandoned; the unlawful entry is not negated by RCW 9A.52.090(1).

Defendant's argument that the trial court erred in limiting the abandonment to the lesser included offense of trespass is without merit and the conviction for burglary in the second degree must be affirmed.

2. **DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE ONLY ERROR IN THE COURT'S INSTRUCTION WAS THE GIVING OF THE INSTRUCTION OF ABANDONMENT.**

An appellate court will presume the defendant was properly represented. *Strickland v. Washington*, 466 U.S. 668, 688-689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L. Ed. 2d 112 (1992); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

A criminal defendant's must overcome this strong presumption of effectiveness of his trial counsel by proof that counsel's representation fell below an objective standard of reasonableness, i.e. that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687. Additionally, the criminal defendant must show there exists a reasonable probability that, but for defense counsel's deficient conduct, the outcome of the trial would have been different. *Strickland*, 466 U.S. at 687.

Washington courts use a two-prong test to overcome the strong presumption of effectiveness that courts apply to counsel's performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *Hendrickson*, 129 Wn.2d at 78; *State v. Bennett*, 87 Wn. App. 73, 77, 940 P.2d 299 (1997). The defendant must meet both prongs of the test to merit relief. *Thomas*, 109 Wn.2d at 225-226; *Bennett*, 87 Wn. App at A defendant must first demonstrate that defense counsel's representation was deficient. *McFarland*, 127 Wn.2d at 334-335; *Bennett*, 87 Wn. App at 77.

The test of incompetence is after considering the entire record, can it be said that the accused was not afforded effective representation and a fair and impartial trial. *State v. Johnson*, 92 Wn.2d 671, 682, 600 P.2d 1249 (1979), *cert. dismissed*, 446 U.S. 948 (1980).

For the second part, the defendant must show prejudice such that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *McFarland*, 127 Wn.2d at 334-335; *Hendrickson*, 129 Wn.2d at 78; *Bennett*, 87 Wn. App at 77.

Because trial strategies and techniques may vary among lawyers, a defense attorney's decision that constitutes a trial tactic or strategy will not support a claim of ineffective assistance of counsel. *In re Personal Restraint of Benn*, 134 Wn.2d 868, 888, 952 P.2d 116 (1998); *Johnson*,

92 Wn.2d at 682; *Hendrickson*, 129 Wn.2d at 78; *Bennett*, 87 Wn. App at 77.

Finally, if the evidence supports a finding beyond a reasonable doubt that the defendant was guilty as charged, it cannot be asserted that his counsel was incompetent simply because the defendant was not acquitted. *Johnson*, 92 Wn.2d at 682.

In alleging ineffective assistance of counsel, the defendant bears the burden of showing there were no legitimate strategic or tactical reasons behind defense counsel's decision. *State v. Rainey*. 107 Wn.App. 129, 135-36, 28 P.3d 10 (2001), *review denied* 145 Wn.2d 1028 (2002).

The instruction regarding the offense of abandonment should not have been given in the instant case. The owner of Mama's restaurant reported the burglary in progress. RP (8-01-2007) 65, 75. He still had supplies and equipment in the restaurant. RP (8-1-2007) 53, 56, 58, 85. He had keys to the restaurant. RP (8-01/2007) 62, 66, 84-85, 130-31, and he did not give the defendant permission to enter or remain at Mama's restaurant. RP (8-01-2007) 62. It is obvious that neither the business nor the building was abandoned and the instruction for abandonment as a defense should not have been given for either trespass or burglary.

Defendant's claim that he was denied effective assistance of counsel because counsel failed to propose any jury instructions regarding

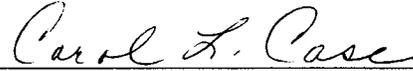
the defense of abandonment is without merit and his conviction must be affirmed.

CONCLUSION

Based on the foregoing, the State respectfully asks this Court to affirm defendant's convictions for burglary in the second degree and theft in the third degree.

DATED this 15th day of April, 2008 at Port Angeles, Washington.

Respectfully submitted,



Carol L. Case, WABA # 17052
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,
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vs.
MARK JENSEN,
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NO. 367-66-1-II

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STATE OF WASHINGTON)
: ss.
County of Clallam)

The undersigned, being first duly sworn, on oath deposes and says:

That the affiant is a citizen of the United States and over the age of eighteen years; that on the 15th day of April, 2008, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of the Brief of Respondent, addressed as follows:

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SUBSCRIBED AND SWORN TO before me this 15th day of, 2008

Ann Marie Monger
(PRINTED NAME:) Ann Marie Monger
NOTARY PUBLIC in and for the State of Washington
Residing at Port Angeles, Washington
My commission expires: 10/21/2008