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A. ASSIGNMENTS OF ERROR

- 1. Orozco-Salazar was denied the effective assistance of counsel.**
- 2. Defense counsel was ineffective for failing to offer instructions on criminal trespass in the first degree.**
- 3. The trial court improperly commented on the evidence via a supplemental jury instruction given in response to a jury question.**

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1. Was Orozco-Salazar denied the effective assistance of counsel when his attorney failed to request instructions on criminal trespass in the first degree? Assignments of Error 1 and 2.**
- 2. Did the trial court's supplemental instruction in response to a jury question improperly comment on the evidence? Assignment of Error 3.**

C. STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Cesar Orozco-Salazar and Antonio Gonzales-Flores have a short history of bad blood. Early one November 2008 morning, their bad blood boiled over and the two fought in Gonzales-Flores's rented room. The State accused Orozco-Salazar of entering Gonzales-Flores's room unlawfully and assaulting him therein. A jury convicted Orozco-Salazar of first degree burglary as charged.

1. Deputy Brett Waddell sets the scene.

The presentation of evidence in this case was simple. The State had two persons testify: Clark County Sheriff Brent Waddell and Antonio Gonzales-Flores. 1RP¹ 21-66.

Deputy Waddell explained that he was dispatched to Annie's Berry Farm in LaCenter. 1RP 21-22. Deputy Waddell described the barn at Annie's. 1RP 30-31. It is a barn that has been converted into a number of small, very basic, individually rented rooms. 1RP 30-31. Outside of the individual rooms are common areas: a living room; an outdoor kitchen; and men's and women's bathrooms. 1RP 31.

When he arrived at the barn, Gonzales-Flores was hanging out the barn window. 1RP 22. Gonzales-Flores, who had a bloody face, was intoxicated. 1RP 22-23. Once inside the barn, Deputy Waddell saw that the door on Gonzales-Flores' rented room was damaged. 1RP 23. Deputy Waddell took digital photos of Gonzalez-Flores' face and the door but the photos were lost before trial. 1RP 33-34.

Deputy Waddell asked Gonzales-Flores what happened and Gonzales-Flores told Deputy Waddell his version of events.² 1RP 29.

¹ "1RP" refers to verbatim labeled "Volume I. "2RP" refers to the verbatim labeled "Volume II."

Gonzales-Flores told Deputy Waddell that it was Orozco-Salazar who caused the injuries to his face and to his door. 1RP 29.

Deputy Waddell looked for Orozco-Salazar but did not find him that day. 1RP 35. About a week later, Deputy Waddell contacted Orozco-Salazar at Annie's. 1RP 35-36. Orozco-Salazar, who was very cooperative, communicated in broken English. 1RP 36-38. Deputy Waddell, through Orozco-Salazar's words and actions, discerned that Orozco-Salazar had been very angry with Gonzales-Flores and kicked his door.³ 1RP 36-38.

2. **Gonzales-Flores and Orozco-Salazar tell conflicting stories.**

Gonzales-Flores testified that earlier in the day, he had attended a family member's Quinceanera in Woodland. 1RP 46. He drank beer while he was there and eventually returned to the barn in the evening to drink more beer and some tequila. 1RP 48-49. Orozco-Salazar and others joined him in drinking at the barn. 1RP 48. Gonzales-Flores eventually went to his own room to go to sleep. 1RP 50. After Gonzales-Flores fell

² The court, over defense objection, admitted as excited utterance, the statements made to Deputy Waddell. 1RP 25-29.

³ There was a CrR 3.6 hearing before trial where the court found certain statements made by Orozco-Salazar admissible. 1RP 8-17.

asleep, Orozco-Salazar kicked in Gonzales-Flores's locked door and attacked him. 1RP 50-52. The attack lasted five minutes. 1RP 52. Gonzales-Flores bled from the nose and lip after Orozco-Salazar hit Gonzales-Flores's nose and mouth, banged Gonzales-Flores's head on the floor one time, and kicked Gonzales-Flores one time. 1RP 52-53. Gonzales-Flores did not fight back because he was drunk. 1RP 53. There was no reason for Orozco-Salazar to be mad at him. 1RP 56. The two men had fought about two weeks earlier. 1RP 61. He speculated the earlier fight was because he kept Orozco-Salazar away from a young girl. 1RP 61-64. Orozco-Salazar had no permission to kick in his door and come into his room that night. 1RP 56.

Orozco-Salazar testified he had also been at the Quinceanera in Woodland but left earlier than Gonzales-Flores and returned to the barn. 1RP 73-74. Orozco-Salazar works at Annie's. 1RP 73. He too has a room in the barn. 1RP 73-74. He has keys to all the rented rooms because he provides general maintenance on the rooms. 1RP 74.

As the evening wore on, four men, including Orozco-Salazar and Gonzales-Flores drank and socialized. 1RP 75. At one point, Gonzales-Flores was called into Orozco-Salazar's room by a man other than Orozco-Salazar. 1RP 76. Gonzales-Flores came to the room and stood at the door. 1RP 76. Gonzales-Flores did not come in the room because

Orozco-Salazar and Gonzales-Flores were not talking to each other. 1RP 76. Eventually, Orozco-Salazar and Gonzales-Flores began hurling insults at each other as they had been doing for about a month. 1RP 76-77. Orozco-Salazar went into the kitchen and Gonzales-Flores followed him. 1RP 78. Orozco-Salazar asked Gonzales-Flores why he was following him. 1RP 78. Orozco-Salazar returned to his room. 1RP 78. Gonzales-Flores came into Orozco-Salazar's room and broke some beer bottles and insulted Orozco-Salazar's mother. 1RP 79. Orozco-Salazar asked Gonzales-Flores if he wanted to fight. 1RP 80. Gonzales-Flores replied, "Whatever." 1RP 80. Gonzales-Flores went to his room and shut the door. 1RP 80. Gonzales-Flores yelled through the door of the room calling Orozco-Salazar an asshole. 1RP 80-81. Orozco-Salazar could not find his key to Gonzales-Flores's door so he kicked in the door with the intent only to confront Gonzales-Flores about insulting his mother. 1RP 81, 89. Once he was in the room, he and Gonzales-Flores engaged in a mutual fight for a few minutes. 1RP 82-83. Orozco-Salazar testified that he had no explicit permission from Gonzales-Flores to kick in his door or enter the room, but that in their culture, Orozco-Salazar's breaking of the bottles in Orozco-Salazar's room coupled with the insulting words about Orozco-Salazar's mother, invited Orozco-Salazar to fight Gonzales-Flores. 1RP 82, 89.

After the fight was over, he went to his bosses bathroom to clean up. 1RP 83. Although he saw that the police were there, he did not think it was a big deal. 1RP 83-87.

3. **Defense counsel did not object to any of the jury instructions and did not offer any lesser included instructions.**⁴

Neither the State nor defense counsel objected to the instructions that were given to the jury. 1RP 91-92. Defense counsel did not offer any lesser included instructions such as first degree criminal trespass. 1RP 91-93 The court strongly suggested that it would at the very least instruct the jury on the lesser included first degree criminal trespass as “it is not a crime to want to talk to someone about something.” 1RP 94. But the court declined to give the lesser because it had not been proposed. 1RP 94.

4. **The jury instructions define unlawful entry.**

The court instructed the jury that to find Orozco-Salazar guilty, it must find that Orozco-Salazar entered or remained unlawfully in a building. In light of the facts of the case, the court gave the following instruction:

⁴ Defense counsel proposed a voluntary intoxication instruction. The court refused to give it because there was no evidence that Orozco-Salazar was intoxicated. 1RP 92-93.

INSTRUCTION NO. 6

A person enters or remains unlawfully in or upon a premises when he or she is not then licensed, invited or otherwise privileged to so enter or remain.

A license or privilege to enter or remain in a building which is only partly open to the person is not a license or privilege to enter or remain in that part of the building which is not open to the person.

CP 10.

5. **Defense counsel argues lesser included first degree criminal trespass in his closing argument.**

“Well, ladies and gentlemen, he’s not guilty of burglary in the first degree, and I’m going to tell you why.” 1RP 108. This is what defense counsel said to open his closing argument. 1RP 108. Defense counsel went on to explain why Orozco-Salazar was not guilty of first degree burglary:

He’d be guilty of an assault, okay, if in fact he had, shall we say, started the fight. But we have two different versions here. We have the version told by Antonino, and we have the version told be Cesar or – I can’t remember his last name, so I’ll say Cesar and Antonino.

Antonino got up there and you saw him testify. I submit to you that his answers were less direct, he spent a lot more time thinking about his answers and what he was going to say than my client, Cesar, did. That Cesar’s answers were direct and to the point much more often, and that is a sign of credibility. And that as much as Antonino might have wanted it to be, he’s the one who go drunk, he’s the one who picked the fight.

And it's uncontested, un rebutted, undisputed, that when he insulted his mother, it was an invitation to fight. And he wasn't going to get out of it by smashing a beer bottle to the floor, running back to his room, and slamming the door. He just wasn't going to get out of that invitation.

And he didn't just go and slam the door, he continued to taunt him. He called him an asshole. So my client did kick the door in.

Now, you don't have the option of convicting my client of an assault. But even then, what he said was he went in there – he didn't go in there with the intent to commit a crime, he went in there to get him to shut up about his mother. And then they got into a fight. And he said, Antonino was waiting for him, ready to fight, and they fought. And I submit to you that that's not an assault characterized by him starting the fight. The fight started with the invitation.

I'll also submit to you that when he invited him to fight, that that was an invitation to enter that room and he was then licensed or otherwise privileged to enter that room at that time. You decide what otherwise privileged means, okay? But I submit to you, you've got two guys, and I submit to you that these were two guys that got drunk. And probably both of them, with the wisdom of hindsight, wish they hadn't have done what they did, but they did it. And I submit to you that my client was otherwise privileged to enter that room. He was invited, separately, and he was invited by the conduct and the actions and the words of Antonino, especially the insult to his mother. The testimony of Antonino (sic), as I said before, which is undisputed, unrefuted, was that that was an invitation to fight. And he wasn't going to get out of it. And he got what he wanted. He wanted a fight, so he got it. So I submit to you that there's insufficient proof beyond a reasonable doubt that there was, in fact, an assault, that it wasn't just a fight that was started by both of them, They both were involved in it. That he was otherwise privileged to go in by the (inaudible) and he was invited to go in. And that you should return a verdict of not guilty.

There's no lesser includeds or anything like that. It's not like you find him guilty if you think he entered unlawfully, if he didn't assault. This was a mutual combat, mutual fight, which I submit that's what the evidence shows, we don't know who started this thing, but I submit to you that if that's what this was, then

that's the end of it, he's not guilty. Whether you reject the invitation or the otherwise licensed or privileged to go in.

And I submit to you that on the other hand, if he was licensed or privileged to go in, then there's no burglary because he didn't enter or remain unlawfully, he was invited in. Thank you.

1RP 109-111.

The prosecutor did not object to defense counsel's line of argument. 1RP 109-111. In his rebuttal argument, the prosecutor reminded the jury that closing argument is not evidence. "The nice thing about that is there's a good instruction that says don't listen specifically to our version of the evidence." 1RP 112. The trial court did not intervene with defense counsel's argument in any way. 1RP 108-111.

6. The jury asks a question.

During deliberation, the jury sent the judge a written question:

in closing arguments. The defense attorney stated that the defendant had privilege to enter the victims room because he was otherwise privileged. What constitutes otherwise privileged?

Is it because he has keys?
Or because he was provoked?

CP 16.

7. The court defines "otherwise privileged" and, in so doing, tells the jury that defense counsel got it wrong.

The court interpreted the jury question as a request to have the court define the term "otherwise privileged." 2RP 117. The court felt that

“otherwise privileged” referred to situations that were not within the evidence in Orozco-Salazar’s case. 2RP 117. The prosecutor suggested that the court instruct the jury, “There is no evidence that the defendant was privileged to enter the apartment.” 2RP 117. The court declined to instruct using that language because, “I don’t want to comment on the evidence.” 2RP 125.

Finding that there was a need for a supplemental instruction to explain the law, the court prepared a supplemental instruction. 2RP 117-119; CP 17. The court gave the jury a copy of the instruction and read it to them as follows:

SUPPLEMENTAL INSTRUCTION NO. 1

1. Possession of keys to a building entitles a person to enter that building only for purposes related to the reason that he has the keys.
2. Provocation does not “otherwise privilege” a non consensual entry into a building.

CP 17; 2RP 128. .

Orozco-Salazar objected to the giving of the supplemental instruction. 2RP 125. He argued that the evidence did support an otherwise privileged entry in that Gonzales-Flores, by his conduct of breaking the beer bottles and insulting his mother, Gonzales-Flores invited Orozco-Salazar to fight in Gonzales-Flores’s room. 2RP 118. Orozco-

Salazar also argued that the prosecutor invited an error in the law by proposing and supporting the instruction defining unlawful entry. “[T]he State has to live with the instructions – in our view, the State has to live with the instruction that was given, and that’s the law of the case. And to change it now changes, in our view, our defense.” 2RP 119. See Instruction 6 above. CP 10.

Orozco-Salazar also moved for a mistrial. 2RP 121. He argued, “This is kind of like invited error by the State. And, you know, I relied upon it in my closing.” The court, in denying the motion for the mistrial, noted that although the defense relied on Instruction 6 in its closing, “there’s no evidence to support that position.” 2RP 122. The court held that there was no prejudice to Orozco-Salazar and the extreme remedy of a mistrial was inappropriate. 2RP 122.

8. Orozco-Salazar is found guilty of first degree burglary and sentenced to prison.

After receiving the supplemental instruction, the jury returned a verdict finding Orozco-Salazar guilty of the only option available to it, first degree burglary. CP 17. Sentencing immediately followed the verdict. 2RP 130. The court imposing a sentence of 21 months, the low end of the 21-27 month standard range. The court noted:

It is a low end case. This is a case that, had it happened out in the common area instead of in his room, it would be a 4th Degree

Assault, perhaps. I didn't hear enough facts to make it anything greater than that. And probably would have done 30 days. But the unwise decision to kick in the door is what really escalates the sentencing range.

2RP 133.

D. ARGUMENT

1. MR. OROZCO-SALAZAR WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; Gideon v. Wainwright, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). It is “one of the most fundamental and cherished rights guaranteed by the

Constitution.” United States v. Salemo, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); State v. Horton, 136 Wn. App. 29, 146 P.3d 1227 (2006). To prevail on a claim of ineffective assistance, an appellant must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004), citing Strickland v. Washington, 466 U.S. 668.; see also State v. Pittman, 134 Wn. App. 376, 383, 166 P.3d 720(2006). There is a strong presumption of adequate performance; however, this presumption is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” Reichenbach, 153 Wn.2d 130.

A. Orozco-Salazar’s attorney’s failure to request instructions on first degree criminal trespass denied Orozco-Salazar an effective counsel.

A criminal defendant may pursue inconsistent defenses at trial, and may even pursue a defense that contradicts the accused’s own testimony. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). For

example, a defendant who testifies that he was not present at the scene of a crime is nonetheless entitled to an inferior degree instruction under appropriate circumstances:

If the trial court were to examine only the testimony of the defendant, it would have been justified in refusing to give the requested inferior degree instruction. As we have observed above, [the defendant] claimed that he was not present at the incident leading to the charge at issue. A trial court is not to take such a limited view of the evidence, however, but must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given.

Fernandez-Medina, 141 Wn.2d at 460-461.

A defendant is entitled to a lesser included offense instruction when (1) each of the elements of the lesser included offense is a necessary element of the charged offense, and (2) the evidence supports an inference that the lesser crime was committed. Fernandez-Medina, 141 Wn.2d at 454 (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). There must be some evidence showing that the defendant committed only the lesser included offense to the exclusion of the greater charged offense. Fernandez-Medina, 141 Wn.2d at 456. Although affirmative evidence must support the issuance of the instruction, such evidence need not be produced by the defendant. Rather, the trial court “must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given.” Id.

An attorney's failure to seek instructions for an offense with lower penalties can deprive an accused of the effective assistance of counsel. Pittman; State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2004). Counsel's failure to request appropriate instructions constitutes ineffective assistance if: (1) there is a significant difference in the penalty between the greater and the lesser included offense; (2) the defense strategy would be the same for both crimes; and (3) sole reliance on the defense strategy in hopes of an outright acquittal is risky. Pittman, supra; Ward, supra.

In Pittman, supra, the defendant was charged with attempted residential burglary. At trial, his attorney failed to request the lesser-included instruction of attempted trespass. The Court of Appeals reversed his conviction, finding that defense counsel's failure to request the instruction constituted ineffective assistance:

[C]ounsel's failure to request a lesser included offense instruction left Pittman in [a] tenuous position ... One of the elements of the offense charged was in doubt--his intent to commit a crime inside [the] home--but he was plainly guilty of some offense. Under the circumstances, the jury likely resolved its doubts in favor of conviction of the greater offense....His entire defense was that he never intended to commit a crime once he was inside [the] home. This was a risky defense [because] he clearly committed a crime similar to the one charged but the jury had no option other than to convict or acquit.

Pittman, 134 Wn. App. at 387-389.

Similarly, in Ward, 125 Wn. App. 243, the defendant was charged with two counts of second degree assault with firearm enhancements. His attorney failed to offer the lesser included offense instruction for unlawful display of a weapon. The Court of Appeals reversed for ineffective assistance:

First, the potential jeopardy for Ward was considerable. He faced 89 months in prison for the two assaults, including the mandatory firearm enhancements. Unlawful display of a weapon, by contrast, is a gross misdemeanor carrying a maximum penalty of one year in jail and revocation of a concealed weapons permit. Misdemeanor offenses are not subject to the imposition of firearm enhancements.

Second, Ward's defenses were the same on both the greater and lesser offenses. His theory at trial was lawful defense of self and property. These are complete defenses to both second degree assault and unlawful display of a weapon. An instruction on the lesser included offense was therefore at little or no cost to Ward. If the jury had believed Ward acted lawfully, he would have been acquitted of both the greater and lesser offenses. If the jury did not believe Ward acted lawfully, but doubted whether he pointed his gun, he would have been convicted only of the misdemeanor.

Finally, self-defense as an all or nothing approach was very risky in these circumstances, because it relied for its success chiefly on the credibility of the accused. Ward testified he believed Tuttle and Baldwin were there to steal his car...But the arresting officers testified Ward told them he was trying to stop a repossession. This greatly impeached Ward's credibility on the defense of property theory and also called into question his testimony that Baldwin was carrying a crowbar in a menacing fashion, thus undermining his theory of self-defense as well. Ward's credibility was further damaged when his testimony about the methamphetamine directly conflicted with his counsel's opening statement. Given the developments at trial and the starkly different potential penalties, it was objectively unreasonable to rely on such a strategy.

In these circumstances, we can see no legitimate reason to fail to request a lesser included offense instruction. The all or nothing strategy exposed Ward to a substantial risk that the jury would convict on the only option presented, two second degree assaults.

Ward, supra, at 249-250.

In this case, defense counsel's failure to request instructions on first degree criminal trespass denied Orozco-Salazar the effective assistance of counsel.

First degree burglary is committed when a person enters or remains unlawfully in a building, with intent to commit a crime against a person or property therein, and while in the building intentionally assaults a person therein. RCW 9A.52.020(1)(b). First degree criminal trespass is committed when a person knowingly enters or remains unlawfully in a building. RCW 9A.52.070(1). First degree criminal trespass is a recognized lesser included offense of first degree burglary. State v. J.P., 130 Wn. App. 887, 895, 125 P.3d 215 (2005); State v. Soto, 45 Wn. App. 839, 841, 727 P.2d 999 (1986).

There was some evidence that only a criminal trespass occurred. Gonzales-Flores testified Orozco-Salazar had no permission to enter his room. Gonzales-Flores had gone to his room after arguing with Orozco-Salazar. Gonzales-Flores shut the door behind him and locked it. Orozco-Salazar testified that he only entered the room because he was

mad at Gonzales-Flores for insulting his mother. He did not enter the room to commit a crime but only to confront him. As the trial court noted, it is not a crime to want to talk to somebody about something. 1RP 94. Furthermore, Orozco-Salazar did not commit a crime once in the room. He and Gonzales-Flores engaged either in mutual combat.

As in Ward and Pittman, an all-or-nothing strategy exposed Orozco-Salazar to greater jeopardy than if his attorney had offered first degree criminal trespass as an alternative. First degree burglary is a class A felony. RCW 9A.52.020(2). Orozco-Salazar's standard sentencing range was 21-27 months. CP 40. First degree criminal trespass is a gross misdemeanor with a maximum penalties of one-year in custody. RCW 9A.36.041(2), 9A.20.021(2). As such, Orozco-Salazar only faced a year in custody on the criminal trespass, far less than his 21-27 month standard range on the burglary. As the trial court noted at sentencing, if Orozco-Salazar had been only convicted of the fourth degree assault, it likely would have sentenced him to 30 days. 2RP 133. A conviction for criminal trespass would likely have received a similar, if not lesser, sentence.

As in Ward and Pittman, Orozco-Salazar's defense - that he entered the room with permission and did not assault Gonzales-Flores - would have been the same for both the criminal trespass and the burglary.

The first degree criminal trespass would not require an inconsistent strategy with the burglary. Thus, there was no cost to Orozco-Salazar in submitting appropriate criminal trespass instructions as a lesser included offense.

Finally, as in Ward and Pittman, relying solely on a complete defense was risky. Had the criminal trespass been offered to the jury, it was possible that they could have found guilt only on that charge. Under Orozco-Salazar's theory of the case, the jury could have found that he entered and remained in Gonzales-Flores's room with permission because the "assault" was actually mutual combat. A guilty verdict on the criminal trespass alone likely would have netted Orozco-Salazar 30 days rather than the 21 months he has been ordered to serve.

Given the conflicting evidence between Gonzales-Flores's version of events and Orozco-Salazar's version of events, it is not unusual that the jury, "with no option other than to convict or acquit," would chose conviction, even if they had doubts about whether Orozco-Salazar entered or remained in Gonzales-Flores's room unlawfully. Pittman, 134 Wn. App. at 389. An "all or nothing" strategy was unreasonable. Orozco-Salazar was denied the effective assistance of counsel by his attorney's failure to request instructions on first degree criminal trespass.

Orozco-Salazar was prejudiced by his attorney's failure to offer instructions on criminal trespass. Both prongs of the Strickland test are met, and Orozco-Salazar was denied the effective assistance of counsel. Pittman, *supra*; Ward, *supra*. Orozco-Salazar's conviction must be reversed and the case remanded for a new trial.

2. THE TRIAL COURT'S SUPPLEMENTAL INSTRUCTION TO THE JURY IS AN UNCONSTITUTIONAL COMMENT ON THE EVIDENCE.

Supplemental jury instruction 1 constituted a judicial comment on the evidence in violation of article IV, section 16 of the Washington Constitution. Orozco-Salazar's conviction should be reversed and his case remanded for retrial.

a. The Constitution prohibits judges from influencing the jury by commenting on the evidence presented at trial.

Article IV, Section 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. Art. IV, § 16. "Because the jury is the sole judge of the weight of the testimony, a trial court violates this prohibition when it instructs the jury as to the weight that should be given certain evidence." In re Detention of R.W., 98 Wn. App. 140, 144, 988 P.2d 1034 (1999).

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to this discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900).

A jury instruction constitutes an impermissible comment on the evidence if the judge's attitude toward the merits of the case or the court's evaluation relative to the disputed issues is inferable from the instruction. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). "The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury." Id.

The court reviews the propriety of jury instruction de novo. State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006).

b. **The trial court improperly commented on the evidence when it instructed the jury Mr. Orozco-Salazar's entry into a room was non consensual.**

Supplemental Instruction 1 states in part, "2. Provocation does not "otherwise privilege" a non consensual entry into a building." CP 17. This instruction violated the constitutional prohibition on judicial comments.

An essential issue at Orozco-Salazar's first degree burglary trial was whether Orozco-Salazar had lawful authority to enter Gonzales-Flores's room. The court, in its original instructions to the jury, gave the following definition of "lawful authority."

INSTRUCTION NO. 6

A person enters or remains unlawfully in or upon a premises when he or she is not then licensed, invited or otherwise privileged to so enter or remain.

A license or privilege to enter or remain in a building which is only partly open to the person is not a license or privilege to enter or remain in that part of the building which is not open to the person.

CP 10. Neither party objected to this instruction.

In closing argument, Orozco-Salazar argued that he was "otherwise privileged" to enter Gonzales-Flores's room. Orozco-Salazar based his argument on the facts of the case. Orozco-Salazar and Gonzales-Flores had been arguing and insulting one another. Gonzales-Flores went into Orozco-Salazar's room and broke an empty and partially full beer bottle. Gonzales-Flores also insulted Orozco-Salazar's mother. Gonzales-Flores went into his room and slammed the door shut. Orozco-Salazar stood outside of Gonzales-Flores's door. Gonzales-Flores continued to yell insults at Orozco-Salazar and called him an asshole. Orozco-Salazar kicked open Gonzales-Flores's door and went in. Orozco-

Salazar explained during his testimony that he did not have explicit permission to enter Gonzales-Flores's room. However, by his words and his conduct – the breaking of the beer bottles in Orozco-Salazar's room, the insults of Orozco-Salazar's mother – Gonzales-Flores was inviting Orozco-Salazar to fight. Orozco-Salazar based his belief on a shared belief of the community in which they both live. 1RP 82-83. Based upon the invitation to fight, Gonzales-Flores was, in essence, giving Orozco-Salazar the privilege to enter his room for a fight.

The prosecutor did not object to Orozco-Salazar's closing argument. It was not until the jury sent the court the following question, the Orozco-Salazar's application of "otherwise privileged" became an issue.

in closing arguments. The defense attorney stated that the defendant had privilege to enter the victims room because he was otherwise privileged. What constitutes otherwise privileged?

Is it because he has keys?
Or because he was provoked?

CP 16.

The court interpreted the jury question as a request to define the term "otherwise privileged." 2RP 117. The court felt that "otherwise privileged" referred to situations that weren't within the evidence in Orozco-Salazar's case. 2RP 117. The court did not cite to any case law to

support its decision. The prosecutor suggested that the court instruct the jury, “There is no evidence that the defendant was privileged to enter the apartment.” 2RP 117. The court declined to instruct the jury using that language because, “I don’t want to comment on the evidence.” 2RP 125.

Finding that there was a need for a supplemental instruction, the court prepared a supplemental instruction. The court gave the jury a copy of the instruction and read it to them as follows:

SUPPLEMENTAL INSTRUCTION NO. 1

1. Possession of keys to a building entitles a person to enter that building only for purposes related to the reason that he has the keys.
2. Provocation does no “otherwise privilege” a non consensual entry into a building.

CP 17.

Defense counsel objected to the giving of the supplemental instruction. 2RP 125. He argued that the evidence did support an otherwise privileged entry in that Gonzales-Flores, by his conduct of breaking the beer bottles and insulting Orozco-Salazar’s mother, invited Orozco-Salazar to fight in Gonzales-Flores’s room. 2RP 118. Defense counsel also argued that the prosecutor invited an error in supporting the instruction defining unlawful entry. “[T]he State has to live with the instructions – in our view, the State has to live with the instruction that

was given, and that's the law of the case. And to change it now changes, in our view, our defense." 2RP 119.

To avoid an improper judicial comment on the evidence, jury instructions must refrain from implying that the jury should credit certain evidence. Lane, 135 Wn.2d at 838. The following instruction is an example of an improper comment on the evidence.

Where a person is accused of larceny, proof of recent possession of property alleged to have been stolen is not of itself sufficient to justify a conviction of larceny.

The possession of recently stolen property when possession of such property is coupled with slight corroborative evidence of other inculpatory circumstances tending to show guilt is sufficient to convict.

State v. Budinich, 117 Wn. App. 336, 337, 562 P.2d 1006 (1977). The court held that even though the above instruction was an accurate statement of the law, "it is not an appropriate instruction for the guidance of the jury in its function as trier of the issues of fact." Id.

The fact that property possessed was recently stolen is relevant and material circumstantial evidence. Its significance is an appropriate subject for argument by counsel, but it is a factual matter which, by express constitutional mandate, may not be commented upon by a trial judge.

Id. at 338 (citing Const. art IV, § 16). As in Budinich, although Supplemental Instruction 1 is arguably a correct statement of the law, it is also an impermissible comment on the evidence.

Another case that shows an instruction may be a correct statement of the law but also an impermissible comment on the evidence is State v. Woldegiorgis, 53 Wn. App. 92, 765 P.2d 920 (1988). There, the court approved the trial court's refusal to give the following instruction in a first-degree murder case:

However, time alone is not enough. The evidence must be sufficient to support the inference that the defendant not only had time to deliberate, but that he actually did so.

Id. at 94 The above instruction correctly states the law of premeditation. See State v. Bingham, 105 Wn.2d 820, 826, 719 P.2d 109 (1986). But the court held the instruction was "unnecessary and unwarranted as a comment on the evidence." Woldegiorgis, 53 Wn. App. at 94.

In another case, the court reversed a conviction where the trial court had instructed the jury:

You are not to draw any conclusions or inferences whatsoever from the absence of a breathalyzer test result in this case nor are you to speculate on the reasons for the absence of such a test result.

Kirkland v. O'Connor, 40 Wn. App. 521, 522, 698 P.2d 1128 (1985). The court held the instruction constituted an impermissible comment on the evidence because "it was possible that the jury understood the instruction to mean it was not to consider that the evidence might be insufficient without a Breathalyzer test result." Id. at 523.

In Orozco-Salazar's case, there is only one way a jury can read the second sentence of Supplemental Instruction 1: Orozco-Salazar's entry into Gonzales-Flores's room was without Gonzales-Flores's consent and that Orozco-Salazar offered no legitimate, lawful excuse for his entry into Gonzales-Flores's room. Ironically, the prosecutor proposed, in response to the jury's question, that the court simply instruct the jury that "There is no evidence that the defendant was privileged to enter the apartment." 2RP 117. The court declined to instruct using that language because, "I don't want to comment on the evidence." 2RP 125. In reality, the court's supplemental instruction does just what the court trial court sought to avoid. It comments on the evidence. It tells the jury that it has concluded that Orozco-Salazar did not have consent to enter Gonzales-Flores's room.

c. **The remedy is reversal and remand for a new trial.**

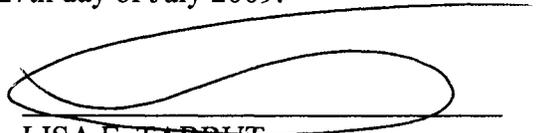
A judicial comment on the evidence in a jury instruction is presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced. State v. Levy, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). Reversal and remand is required unless the record affirmatively shows that no prejudice could have resulted. Id. This Court

should reverse Orozco-Salazar's conviction because the State cannot show absence of prejudice.

E. CONCLUSION

For the foregoing reasons, Mr. Orozco-Salazar's conviction should be reversed and his case remanded for retrial.

Respectfully submitted this 27th day of July 2009.

A handwritten signature in black ink, appearing to read "LISA E. TABBUT", is written over a horizontal line. The signature is somewhat stylized and loops back to the left.

LISA E. TABBUT
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Attorney for Appellant

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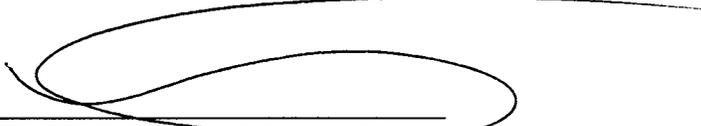
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All postage prepaid, on July 27, 2009.

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

Signed at Longview, Washington, on July 27, 2009.



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