

COURT OF APPEALS
DIVISION II

09 OCT -9 PM 12:02

NO. 38827-8-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY
DEPUTY

STATE OF WASHINGTON, Respondent

v.

CESAR OROZCO-SALAZAR, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROGER A. BENNETT
CLARK COUNTY SUPERIOR COURT CAUSE NO.08-1-01989-6

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

For the most part, the State agrees with the statement of facts as set forth by the appellant. Because of the nature of the issues, additional factual information will be supplied in the argument section of the brief.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim of ineffective assistance of counsel because the defense attorney did not raise criminal trespass as a lesser included instruction of the burglary in the first degree.

The defendant, when he testified acknowledged that he and the complaining witness were both at a party and had been drinking rather heavily. (RP 72-74). He acknowledged bad blood between him and the complaining witness which had started the week before with a series of insults. (RP 77). He testified that the insults continued to their living areas and he did acknowledge that fighting words were exchanged. (RP 79-80). The complaining witness went to his room, closed the door and that while he was in his room behind the door continued to yell things at the defendant. He indicated that the type of things he was yelling was that the defendant was an “asshole”. This apparently made the defendant angry and he kicked in the door of the complaining witness’ living area

and then entered his apartment. (RP 80-81). He indicated that both of them were exchanging blows and fighting while there in the room.

The defense attorney asked the defendant whether or not he believed he was invited into the room or that the complaining witness wanted the fight to continue. The defendant answered “In breaking the bottles in my room and in insulting my mother, yes.” (RP 82, L.21-22).

The Information filed in this case charged burglary in the first degree based on the unlawful entry of the building where the complaining witness was located and that there was an intentional assault of a person at that location. (CP 1).

At the close of the testimony, the court instructed the jury. (CP 2). The defense, in its closing argument, set forth what it was that they were attempting to do in this case. The defense attorney was arguing to the jury that in fact there was an invitation to enter the room and that therefore he was licensed or otherwise privileged to enter the room because of the conduct and actions of the complaining witness.

Defense Attorney, Closing Argument in Part:

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 that 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 disputed, 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 included 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 otherwise privileged to go in, then there's no burglary because he didn't enter or remain unlawfully, he was invited in. Thank you.

- (RP 110, L.14 – 111, L.24)

To show ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's

performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 140 L. Ed. 2d 323, 118 S. Ct. 1193 (1998). Prejudice occurs when there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In other words, counsel’s deficiencies must have adversely affected the defendant’s right to a fair trial to an extent that “undermines confidence in the outcome.” State v. Brett, 126 Wn.2d 136, 199, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 133 L. Ed. 2d 858, 116 S. Ct. 932 (1996); State v. Horton, 116 Wn. App. 909, 922, 68 P.3d 1145 (2003) (quoting Strickland, 466 U.S. at 694). Although deliberate tactical choices may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance, “exceptional deference must be given when evaluating counsel’s strategic decisions.” State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

When trial counsel’s actions involve matters of trial tactics, the court hesitates to find ineffective assistance of counsel. State v. Jones, 33 Wn. App. 865, 872, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983). And the court presumes that counsel’s performance was reasonable. State v. Bowerman, 115 Wn.2d 794, 808, 802, P.2d 116 (1990).

To prove ineffective assistance of counsel, the defendant must show that trial counsel unreasonably and prejudicially pursued an “all or nothing” defense against the charged crimes rather than propose lesser included instructions. Compare State v. Ward, 125 Wn. App. 243, 250, 104 P.3d 670 (2004) (all or nothing defense unreasonable when it exposes the defendant to an unreasonable risk that the jury will convict on the only option presented) with State v. Hoffman, 116 Wn.2d 51, 112-13, 804 P.2d 577 (1991) (forgoing a lesser included offense instruction may be a legitimate trial strategy).

The decision to not request an instruction on a lesser included offense is not ineffective assistance of counsel if it can be characterized as part of a legitimate trial strategy to obtain an acquittal. State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979); State v. Hoffman, 116 Wn.2d 51, 804 P.2d 577 (1991). In King, a prosecution for assault in the second degree, the Appellate Court held that counsel was not deficient in failing to request a lesser included instruction on simple assault because “it was an all-or-nothing tactic that well could have resulted in an outright acquittal.” King, 24 Wn. App. at 501.

The State would question whether or not the Workman test has been complied with in this situation. Clearly, there are concerns about the factual issues because of the nature of the charging. The charging

involved an assault and the factual nature of the information describes breaking in a door for the purposes of a fist fight in a room.

The defendant on appeal argues that evidence adduced at trial supported a jury instruction on criminal trespass. A defendant must be granted a jury instruction for a lesser included offense if (1) all the elements of the lesser offense are necessarily included in the elements of the charged offense and (2) the evidence supports an inference that the lesser crime was committed. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

The first prong of the Workman test is easily satisfied in this case. The defendant was charged with burglary in the first degree, a crime defined as entering or remaining unlawfully in a building with intent to commit a crime against a person or property therein and someone is assaulted. RCW 9A.52.020(1)(b). A first degree burglary charge necessarily includes the elements of criminal trespass, which requires that a person knowingly enter or remain unlawfully in a building. RCW 9A.52.070(1); State v. Soto, 45 Wn. App. 839, 727 P.2d 999 (1986) (holding that burglary in the second degree includes first degree criminal trespass).

The second prong of the Workman test is at issue in this case. The factual inquiry is satisfied “when substantial evidence in the record

supports a rational inference that the defendant committed only the lesser included or inferior degree offense to the exclusion of the greater offense.” State v. Fernandez-Medina, 140 Wn.2d 448, 461, 6 P.3d 1150 (2000). In deciding whether the record supports the inference that only the lesser included offense was committed, the Appellate Court reviews the record in the light most favorable to the party requesting the instruction, namely the defendant. State v. Fernandez-Medina, 141 Wn.2d at 455-56. The violence in the entry in this case and the fact of an assault have nothing to do with a simple trespass. The State submits that the lesser is inappropriate based on these facts.

But even assuming that this matter would properly be a lesser included, it is obvious from the nature of the defense that this was a tactical decision made by the defense. It was an attempt to overcome, not only the assault, but also a claim of an unlawful entry into a residence. The claim of some type of privilege or invitation because of the conduct is novel, but it is not out of the realm of consideration by a jury. It is interesting to note in our case that this led to a request by the jury for additional clarification. It is obvious, therefore, that someone was paying attention to this potential defense.

The State submits that there has been no showing by the defense of ineffective assistance of counsel. The not giving of the lesser included

may not have been warranted under the Workman test but, further, the approach taken by the defense was clearly one of trial tactics and as such ineffective assistance of counsel is not demonstrated.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a claim that the trial court improperly commented on the evidence concerning the supplemental jury instruction that was given in response to a jury question.

A copy of the main jury instructions (CP 2), a copy of the jury question (CP 16) and a copy of the supplemental instruction (CP 17) are all attached hereto and by this reference incorporated herein.

The questions by the jury would clearly indicate an area of law as opposed to fact. This is something that the trial court emphasized when making its ruling concerning this.

THE COURT: Well, those aren't facts, okay? Those are issues of law you just referred to. Whether or not a - - being provoked or having keys qualifies as, quote, otherwise privileged to enter a room. I mean, that's an issue of law. The - - the otherwise privileged language applies where entry is made under some claim of right, for example, a fireman going into a locked building in response to an emergency situation. He doesn't have consent. His privilege to do so is implied in law.

In the way that the jury phrased this, "In closing arguments, the defense attorney stated the defendant had privilege to enter, because he was otherwise privileged. What constitutes the otherwise privileged?" It looks like they're

just trying to figure out what you were referring to in your argument; and they've picked up on two issues - - two factual issues that you did argue to the jury. I think I have to clarify - - I have to answer the question and clarify what is the law of otherwise privileged. So - -

Now, there is an issue here, and that is, will, he had keys to get in. Does that constitute a privilege to get in? And the answer is, yes, for the purposes related to why he had the keys. He testified, I believe, he was a handyman. So yes, he has the right to go in and fix things and perform his duties as an employee or handyman in the room.

I don't think you can stretch that to, he has implied privilege to go in and beat somebody up or to get into a mutual combat for that matter, if the - - which is more in line of his testimony. There was no evidence he went in there to repair anything, other than his mother's damaged reputation.

- (RP 119, L.19 – 120, L.25)

Article IV, section 16 of the Washington Constitution provides that “judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” A statement by the court constitutes an impermissible comment on the evidence where the court's attitude toward the merits of the case or the court's evaluation of a disputed issue is inferable from the statement. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); State v. Cerny, 78 Wn.2d 845, 855, 480 P.2d 199 (1971) (vacated on other grounds), 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

An impermissible comment conveys to the jury a judge's personal attitudes toward the case merits or permits the jury to infer from what the judge said or did not say what the judge believed or disbelieved about the questioned topic. Hamilton v. Dept't of Labor & Indus., 111 Wn.2d 569, 571, 761 P.2d 618 (1988). An instruction doing no more than accurately stating the law does not constitute an impermissible comment. State v. Ciskie, 110 Wn.2d 263, 282-83, 751 P.2d 1165 (1988) (citing City of Seattle v. Smiley, 41 Wn.App. 189, 192, 702 P.2d 1206 (1985)). The touchstone of error is whether or not the feelings of the trial court as to the truth value of the testimony of a witness has been communicated to the jury. State v. Gitchel, 5 Wn. App. 72, 486 P.2d 325 (1971). Here, the trial court merely restated the prior instructions and did not suggest to the jury the decision it ought to reach. Nothing in the court's answer conveys the court's personal attitudes. The determination of whether an instruction constitutes a comment on the evidence depends on the facts and circumstances of each case. State v. Stearns, 61 Wn. App. 224, 231, 810 P.2d 41, review denied, 117 Wn.2d 1012, 816 P.2d 1225 (1991). No improper judicial comment is shown.

The State submits that the trial court has done nothing inappropriate in the supplemental responses given to the jury. It appears that this is an attempt by the court to clarify the law as opposed to facts

and, certainly, does not indicate the trial court's belief, or disbelief, of any of the testimony provided in the case. There is no evidence here to suggest that a feeling of the trial court as to the truth value of the testimony of the witnesses has been communicated to the jury.

IV. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 7 day of Oct, 2009.

Respectfully submitted:

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Prosecuting Attorney
Clark County, Washington

By:


MICHAEL C. KINNIE, WSBA#7869
Senior Deputy Prosecuting Attorney

APPENDIX "A"
COURT'S INSTRUCTIONS TO THE JURY

14

3:26pm
FILED

JAN 26 2009
Heather Hunt Deputy
Sherry W. Parker, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

CESAR OROZCO-SALAZAR,

Defendant.

No. 08-1-01989-6

COURT'S INSTRUCTIONS TO THE JURY

Roger A. Bennett

SUPERIOR COURT JUDGE

Jan. 26, 2009

DATE

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INSTRUCTION NO. 4

When you begin deliberating, you should first select a foreman. The foreman's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you will need to rely on your memory as to the testimony presented in this case. Testimony will not be repeated for you during your deliberations.

You will be given the exhibits admitted in evidence, if any, these instructions, and a verdict form for recording your verdict.

You must fill in the blank provided in the verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form to express your decision. The foreman must sign the verdict form and notify the bailiff. The bailiff will bring you into court to declare your verdict.

INSTRUCTION NO.

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the

opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. The lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

A trial judge may not comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider all the instructions.

As jurors, you are officers of this court. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. _____

4

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. _____

To convict the defendant of the crime of burglary in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 16th day of November, 2008, the defendant entered or remained unlawfully in a building;
- (2) That the entering or remaining was with intent to commit a crime against a person therein;
- (3) That while in the building the defendant assaulted a person; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 6

A person enters or remains unlawfully in or upon 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.

INSTRUCTION NO. 7

Building, in addition to its ordinary meaning, includes any dwelling. Building also includes any other structure used for lodging of persons. Each unit of a building consisting of two or more units separately secured or occupied is a separate building.

INSTRUCTION NO. 00

It is a crime to commit an assault.

An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

INSTRUCTION NO. 9

Bodily injury, physical injury or bodily harm means physical pain or injury,

INSTRUCTION NO. 16

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

APPENDIX "B"

JURY QUESTION

SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR CLARK COUNTY
DEPARTMENT NO. 1
PO BOX 5000
VANCOUVER, WA 98666-5000

FILED

JAN 27 2009



ROGER A. BENNETT
JUDGE

Sherry W. Parker, Clerk, Clark Co.

TELEPHONE (360) 397-2315
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DATE: 1-26-09

08-1-01989-6

RE: PRIVILEGE

TIME QUESTION RECEIVED: 4:52 p.m. 1/26/09

TIME QUESTION ANSWERED: 9:37

This note must be saved because it is part of the official court record.

*IN CLOSING ARGUMENTS. THE DEFENCE ATTORNEY
STATED THAT THE DEFENDANT HAD PRIVILEGE TO
ENTER THE VICTIM'S ROOM BECAUSE HE WAS OTHERWISE
PRIVILEGED. WHAT CONSTITUTES OTHERWISE PRIVILEGED?*

Is it because he has keys?

Or because he was provoked?

15
H

APPENDIX "C"
SUPPLEMENTAL INSTRUCTION

FILED

JAN 27 2009

Sherry W. Parker, Clerk, Clark Co.

SUPPLEMENTAL INSTRUCTION NO. 7

08-1-01989-6

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.

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