

No. 40763-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

DENNIS WAYNE BROOKS,

Appellant.

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STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS
DIVISION II

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable James Warne

REPLY BRIEF OF APPELLANT

THOMAS M. KUMMEROW
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A. ARGUMENT

1. THE STATE FAILED TO PROVE AN ESSENTIAL ELEMENT OF THE OFFENSE: THAT THE RESIDENCE WAS A “DWELLING”

In his opening brief, Mr. Brooks argued the State failed to prove an essential element of the offense of residential burglary: that the house was a “dwelling” as that word is defined in RCW 9A.04.110(7). Citing the decision in *State v. J.P.*, 130 Wn.App. 887, 125 P.3d 215 (2005), the State claims the defense of “abandonment” is not available to one charged with residential burglary, and the house was not “abandoned” because there was someone available to secure the house once the entry was discovered. Brief of Respondent at 3-4.¹ The State’s argument is not responsive to Mr. Brooks’ argument as it misses the entire point of his argument.

Relying on the factors cited in *State v. McDonald*, 123 Wn.App. 85, 90, 96 P.3d 468 (2004), Mr. Brooks contended this particular house did not meet the essential element the Due Process Clause of the Fourteenth Amendment requires the State to prove beyond a reasonable doubt: that the house was a “dwelling.”

¹ Oddly enough, the decision in *J.P.*, relied upon by the State specifically rejects the State’s argument that abandonment does not apply to residential burglary. 130 Wn.App. at 895 (“*J.P.* persuades us that [*City of Bremerton v. Widell* permits him to assert an abandonment defense to residential burglary.”]).

Mr. Brooks did *not* argue the house was abandoned. The State fails to recognize that a house can be both not abandoned but still not be a “dwelling.”

Here, contrary to the State’s cursory and conclusory claim, Mr. Brooks never claimed the house was abandoned; he claimed the State failed in its burden of proving every element of the offense. As Mr. Brooks argued, the house may have been a dwelling at one time, but was no longer a dwelling and was merely a building when Mr. Brooks and Mr. Petersen entered. The testimony of Deputy Robinson and Ms. Shepard established the house had not been lived in for several years and had not been maintained in the interim. RP 79-80, 119. The plants had overgrown the house and cobwebs had gathered across the front door. *Id.* The State failed to prove the house was a dwelling, thus failing to prove that Mr. Brooks was guilty of residential burglary.

2. MR. BROOKS ESTABLISHED PREJUDICE
FOR THE PURPOSES OF SHOWING HIS
ATTORNEY RENDERED
CONSTITUTIONALLY DEFICIENT
REPRESENTATION

Mr. Brooks contended his attorney rendered deficient representation because he failed to propose a lesser degree instruction for second degree burglary in light of the fact the

evidence established both the legal and factual requirements for a lesser degree instruction. In response, the State does not contend that Mr. Brooks failed to establish the lesser degree instruction was either legally or factually supported. Therefore it must be presumed in light of its subsequent argument that the State concedes Mr. Brooks established the lesser degree instruction was both factually and legally supported.

Rather, the State argues, again in completely conclusory fashion, that Mr. Brooks failed to establish he suffered any prejudice. Brief of Respondent at 4-13. Besides a lengthy citation to legal decisions on Sixth Amendment claims, the State's brief fails to point out with any specificity why Mr. Brooks failed to establish prejudice, just that he did. Nevertheless, Mr. Brooks submits he has established prejudice and is entitled to reversal of his conviction.

In order to establish prejudice, Mr. Brooks "must show that 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). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

The defendant is not required to establish his innocence or even demonstrate “that counsel's deficient conduct more likely than not altered the outcome in the case.” *Strickland*, 466 U.S. at 693. In order to establish prejudice, Mr. Brooks need only show that had defense counsel sought a lesser degree instruction for second degree burglary discussed above, there is a reasonable probability that the jury's verdict would have been different. *Id.* at 694.

Had the jury been instructed, the jury could have rendered a verdict that Mr. Brooks was only guilty of second degree burglary, which is not only a lesser degree of residential burglary but a less serious offense. *Compare* RCW 9A.52.025(2) and RCW 9A.52.030(2) (while both offenses are class B offenses, “[i]n establishing sentencing guidelines and disposition standards, the sentencing guidelines commission and the juvenile disposition standards commission shall consider residential burglary as a more serious offense than second degree burglary.”).

Further, the sentencing consequences to Mr. Brooks were substantial. His standard range for residential burglary was 63 to 84 months. The court sentenced Mr. Brooks to low end of 63 months. The standard range for second degree burglary was 51 to 68 months, thus had the court followed through and sentenced Mr.

Brooks at the low end of the standard range, Mr. Brooks would have saved a full year.

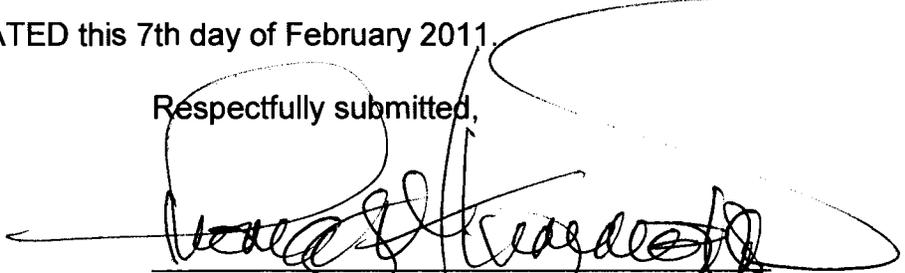
Mr. Brooks received ineffective assistance of counsel which prejudiced him. Mr. Brooks is entitled to reversal of his conviction and remand for a new trial.

B. CONCLUSION

For the reasons stated in the instant reply brief as well as the previously filed Brief of Appellant, Mr. Brooks requests this Court reverse his conviction with instructions to dismiss or remand for a new trial. Further, for the reasons stated in the Brief of Appellant, Mr. Brooks also requests this Court reverse the trial court's imposition of costs and fees and remand for a determination of the trial court to waive the costs and fees in light of his inability to pay.

DATED this 7th day of February 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over a horizontal line. The signature is stylized and somewhat cursive.

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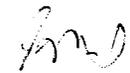
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 STATE OF WASHINGTON
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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF FEBRUARY, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF FEBRUARY, 2011.

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