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No. 41416-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Benjamin Rivas,

Appellant.

Lewis County Superior Court Cause No. 10-1-00475-5

The Honorable Judge James Lawler

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Rivas's convictions violated his Fifth, Sixth, and Fourteenth Amendment right to notice of the charge against him.
2. Mr. Rivas's convictions violated his state constitutional right to notice of the charge against him under Wash. Const. Article I, Sections 3 and 22.
3. The First Amended Information was deficient because it failed to allege an essential element of second-degree malicious mischief.
4. The First Amended Information was deficient because it failed to outline specific facts describing Mr. Rivas's alleged conduct.
5. Mr. Rivas's conviction for second-degree malicious mischief infringed his Fourteenth Amendment right to due process because the court's instructions relieved the state of its obligation to prove an essential element of the charged crime.
6. The court's instructions failed to make the relevant legal standard manifestly clear to the average juror.
7. The trial court erred by giving Instruction No. 17.
8. The court's instructions relieved the state of its burden to prove that Mr. Rivas's multiple acts of malicious mischief were part of a common scheme or plan.
9. Defense counsel was ineffective for failing to propose a proper "to convict" instruction.
10. Defense counsel was ineffective for failing to properly present the testimony of the 911 dispatcher.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A criminal Information must set forth all essential elements of an offense. Here, the charging document failed to allege that Mr. Rivas committed multiple acts of malicious mischief as

part of a common scheme or plan, elevating them to a felony offense (due to the total value of the damage caused). Did the Information omit an essential element of the charged crime in violation of Mr. Rivas's right to adequate notice under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Section 22?

2. An accused person is constitutionally entitled to be informed of the factual allegations against him. The Amended Information in this case did not outline any specific facts describing Mr. Rivas's alleged conduct. Was Mr. Rivas denied his constitutional right to adequate notice of the charge under the Fifth, Sixth, and Fourteenth Amendments, and under Wash. Const. Article I, Sections 3 and 22?
3. A trial court's instructions must inform the jury of the state's burden to prove every essential element of the charged crime. Here, the court's instructions allowed conviction absent proof that Mr. Rivas's multiple acts of malicious mischief were part of a common scheme or plan, allowing aggregation of the damages inflicted and elevating the crime to a felony. Did the trial court's instructions relieve the prosecution of its burden to prove the essential elements of second-degree malicious mischief in violation of Mr. Rivas's Fourteenth Amendment right to due process?
4. An accused person is constitutionally entitled to counsel who is familiar with the applicable law. Here, defense counsel failed to propose a proper "to convict" instruction. Was Mr. Rivas denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

After someone smashed the windows of his father's van, Benjamin Rivas went to the neighborhood where he believed the perpetrator's car could be found. RP (10/19/10) 35-36, 66. He located what he thought was the car, smashed its windows, and, for good measure, broke the windows of another nearby vehicle. RP (10/18/10) 33-44; RP (10/19/10) 37. After breaking the windows of the two cars, he ran to rejoin his friends, who were waiting nearby. While running, he realized he was being chased. He fell, and dropped the crowbar he had used to smash the windows. RP (10/19/10) 38-40.

One of his pursuers was a woman with a shotgun, and he heard a male voice yell "Shoot the son of a bitch." RP (10/19/10) 39, 40. The next time he looked back, he saw that a man held the shotgun and was aiming it at him. RP (10/19/10) 41. He ran from the area as police arrived, but was detained soon thereafter.¹ RP (10/18/10) 112-115; RP (10/19/10) 43.

Mr. Rivas told the arresting officer that he was running from a crime scene, and showed the officer the vehicle windows he had broken.

¹ When detained, he was out of breath, and had to be cleared by medics before he was questioned. RP (10/19/10) 115.

RP (10/18/10) 116-117. The officer described Mr. Rivas as cooperative, and noted that he was “visibly upset” and “remorseful” when he realized that he had mistakenly broken vehicle windows belonging to someone other than the person who had vandalized his father’s van. RP (10/18/10) 122-123.

The prosecution alleged that Mr. Rivas swung his crowbar at one of his pursuers, and charged Mr. Rivas with second-degree assault with a deadly weapon enhancement (Count I).² CP 1-2. He was also charged with second-degree malicious mischief (Count II) and second-degree criminal trespass (Count III).³ CP 3-4.

The operative language of Count I charged that Mr. Rivas “did intentionally assault another person with a deadly weapon... AND FURTHERMORE, at the time of the commission of the crime, the defendant was armed with a deadly weapon other than a firearm...”⁴ CP 2. It did not name the victim, describe Mr. Rivas’s conduct, or specify the weapon used. CP 2.

² First-degree assault was charged as an alternative; however, Mr. Rivas was acquitted of that charge. Verdict Form A, Supp. CP.

³ The trespass charge resulted in a not guilty verdict. Verdict Form D, Supp. CP.

⁴ As noted above, Mr. Rivas was acquitted of the alternative charge of first-degree assault. Verdict Form A, Supp. CP.

The operative language of Count II charged that he “did knowingly and maliciously cause physical damage to the property of another in an amount exceeding seven hundred and fifty dollars (\$750.00).” CP 3. It did not allege that multiple items of property were damaged as part of a common scheme or plan; nor did it name the victim, describe Mr. Rivas’s conduct, or describe the damaged property. CP 3.

At trial, Mr. Rivas testified to the version of events outlined above, and denied assaulting anyone. RP (10/19/10) 35-60. His account was corroborated by the testimony of Jovanny Montenegro Perez, a friend who had remained in the car while Mr. Rivas went on his mission of revenge. RP (10/19/10) 64-84.

During cross-examination of Officer Makein, defense counsel sought to introduce evidence that the 911 dispatcher heard a male voice shout “Shoot the son of a bitch.” RP (10/18/10) 94. The court excluded the evidence as “double hearsay.” RP (10/18/10) 99. Defense counsel did not call the dispatcher, or seek to establish an exception to the hearsay rule that would allow the dispatcher’s out-of-court statement to be admitted through Officer Makein.⁵ RP (10/18/10) 94-99.

⁵ Defense counsel did argue that the statement itself—“Shoot the son of a bitch”—was either not hearsay (because not offered for its truth) or qualified as an excited utterance. RP (10/18/10) 94-99.

The owner of the vehicles testified that she was awakened by the police, and notified that her car and truck had been vandalized. RP (10/18/10) 32-33. The car windows were repaired for around \$503; the truck windows cost around \$255. RP (10/18/10) 37-39, 43.

The prosecutor also presented the testimony of the man and woman who had pursued Mr. Rivas with the shotgun. Maria Cranston testified that she grabbed her phone and an unloaded shotgun and followed her fiancé Cassidy Bailey outside after hearing noises. RP (10/18/10) 78-79. She followed the sound of Bailey yelling and found him in a confrontation with three men—although she told the police that there were only two other men. RP (10/18/10) 80, 86. She claimed that Bailey was on the ground, that two men were throwing rocks at him, and that a third—whom she identified as Mr. Rivas—was swinging a crowbar at him.

Cross examination revealed that she never mentioned the crowbar to police, and never told the officers that the man had assaulted Bailey. RP (10/18/10) 80-81. When Cranston cocked the shotgun, two of the men raised their arms in surrender, while the man with the weapon fled. RP (10/18/10) 82. She denied that Bailey had ever touched the shotgun. RP (10/18/10) 86.

Like Cranston, Bailey told officers there were only two men, but testified that he pursued three men. RP (10/18/10) 52, 61. He claimed that the three surrounded him and that one swung at him several times with a crowbar before being scared away by Cranston. RP (10/18/10) 53-56. He did not remember anyone shouting "Shoot the son of a bitch." RP (10/18/10) 62. He denied touching the shotgun, and claimed he was unaware that he was prohibited from possessing a firearm.⁶ RP (10/18/10) 62-67.

Officers testified that Bailey was yelling and excited when they first arrived on the scene; one officer had to yell at him to calm down. RP (10/18/10) 106; RP (10/18/10) 33. He smelled strongly of alcohol, had watery eyes, and was obviously intoxicated. RP (10/19/10) 29, 31.

The court's "to convict" instruction for Count II provided as follows:

⁶ Mr. Rivas established that Bailey had lost the right to own or possess a firearm, and that he had not taken steps to have his gun rights restored. RP (10/18/10) 63-67.

No. 17

To convict the defendant of the crime of malicious mischief in the second degree, each of the following three elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about and between August 4, 2010 and August 5, 2010, the defendant caused physical damage to the property of another in an amount exceeding \$750;
- (2) That the defendant acted knowingly and maliciously; and
- (3) That this act 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. 17, Court's Instructions to the Jury, Supp. CP. None of the court's instructions mentioned the phrase "common scheme or plan."

Court's Instructions to the Jury, Supp. CP. Defense counsel did not propose instructions, and did not object to the court's instructions. RP (10/19/10) 87.

Mr. Rivas was convicted of Assault in the Second Degree (with a deadly weapon enhancement) and Malicious Mischief in the Second Degree. Verdict Forms B and C, Supp. CP; Special Verdict Form B, Supp. CP. With no felony history, he was sentenced to 18 months in prison and 18 months of community custody. CP 6-8. He timely appealed. CP 14.

ARGUMENT

I. MR. RIVAS'S CONVICTIONS WERE ENTERED IN VIOLATION OF HIS RIGHT TO NOTICE UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, AND UNDER WASH. CONST. ARTICLE I, SECTIONS 3 AND 22.

A. Standard of Review.

The interpretation of a statute is a question of law reviewed *de novo*. *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009).

Constitutional violations are also reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010).

A challenge to the sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wash.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Id.*, at 105. The test is whether or not the necessary facts appear or can be found by fair construction in the charging document. *Id.*, at 105-106. If the Information is deficient, prejudice is presumed and reversal is required. *State v. Courneya*, 132 Wash.App. 347, 351 n. 2, 131 P.3d 343 (2006); *State v. McCarty*, 140 Wash.2d 420, 425, 998 P.2d 296 (2000).

B. The First Amended Information was legally insufficient because it omitted an essential element of second-degree malicious mischief as charged.

A criminal defendant has a constitutional right to be fully informed of the charge he or she is facing. This right stems from the Fifth, Sixth, and Fourteenth Amendments to the federal constitution, as well as Article I, Section 3 and Article I, Section 22 of the Washington State Constitution. The right to a constitutionally sufficient Information is one that must be “zealously guarded.” *State v. Royse*, 66 Wash.2d 552, 557, 403 P.2d 838 (1965).

All of the essential elements of a crime must be alleged in the charging document. *State v. Brown*, 169 Wash.2d 195, 198, 234 P.3d 212 (2010). An essential element is “one whose specification is necessary to establish the very illegality of the behavior.” *State v. Johnson*, 119 Wash.2d 143, 147, 829 P.2d 1078 (1992) (citing *United States v. Cina*, 699 F.2d 853, 859 (7th Cir.), cert. denied, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983)). Any fact that elevates a crime from a misdemeanor to a felony is an element of the crime. See, e.g., *State v. Roswell*, 165 Wash.2d 186, 196 P.3d 705 (2008) (prior conviction is an element when it elevates a crime from misdemeanor to felony).

Under RCW 9A.48.080, a person is guilty of second-degree malicious mischief if s/he knowingly and maliciously “[c]auses physical

damage to the property of another in an amount exceeding seven hundred fifty dollars...” Damage to multiple items of property can be aggregated to reach this dollar amount, but only if the damage results from a common scheme or plan:

If more than one item of property is physically damaged as a result of a common scheme or plan by a person and the physical damage to the property would, when considered separately, constitute mischief in the third degree because of value, then the value of the damages may be aggregated in one count. If the sum of the value of all the physical damages exceeds two hundred fifty dollars [sic], the defendant may be charged with and convicted of malicious mischief in the second degree.

RCW 9A.48.100(2); *see also* WPIC 85.12, Note on Use.

Thus, in order to convict a person of second-degree malicious mischief arising from damage to multiple items, the state must not only allege and prove damage exceeding \$750, but must also allege and prove that the damage resulted from a common scheme or plan.

In this case, the Amended Information alleged only that Mr. Rivas “did knowingly and maliciously cause physical damage to the property of another in an amount exceeding seven hundred and fifty dollars (\$750.00).” CP 3. The state did not allege that Mr. Rivas damaged more than one item as part of a common scheme or plan. CP 1-4.

Accordingly, the First Amended Information was legally deficient. Because of this deficiency, Mr. Rivas's malicious mischief conviction must be reversed and the case dismissed without prejudice. *Brown, supra*.

C. The First Amended Information was factually deficient because it failed to notify Mr. Rivas of the specific facts alleged by the state.

A charging document must notify the accused person of the underlying facts. *State v. Leach*, 113 Wash.2d 679, 689, 782 P.2d 552 (1989). The rule

requires that a charging document *allege facts supporting every element of the offense*, in addition to adequately identifying the crime charged. This is not the same as a requirement to 'state every *statutory element* of' the crime charged.

Id (emphasis in original).⁷ Following *Leach*, the Supreme Court elaborated further:

There are two aspects of this notice function involved in a charging document: (1) the description (*elements*) of the crime charged; and (2) a description of the specific *conduct* of the defendant which allegedly constituted that crime... [T]he "core holding of *Leach* requires that the defendant be apprised of the elements of the crime charged and the conduct of the defendant which is alleged to have constituted that crime."

⁷ The *Leach* court explained that this rule applies to charging documents other than citations issued at the scene: "Complaints must be more detailed since they are issued by a prosecutor who was not present at the scene of the crime. Defining the crime with more specificity in a complaint assists a defendant in determining the particular incident to which the complaint refers... [Where a citation is issued at the scene, the defendant] presumably know[s] the *facts* underlying [the] charges." *Leach*, at 699.

Auburn v. Brooke, 119 Wash.2d 623, 629-630, 836 P.2d 212 (1992)

(footnotes omitted, emphasis in original).

A prosecuting authority must include in the charging document reference to the specific facts of the offense, rather than relying solely on the abstract and general language of the statute. *Id.* This reflects the historical practice that has prevailed in Washington since before the adoption of the state constitution.

For example, an 1888 indictment charging first-degree murder used the following language:

Henry Timmerman is accused by the grand jury...of the crime of murder in the first degree, committed as follows: He (said Henry Timmerman) in the said county of Klickitat, on the 3d day of October, 1886, purposely, and of his deliberate and premeditated malice, killed William Sterling, by then and there purposely, and of his deliberate and premeditated malice, shooting and mortally wounding the said William Sterling with a pistol which he (the said Henry Timmerman) then and there held in his hand, and from which mortal wound the said William Sterling instantly died.

Timmerman v. Territory, 3 Wash.Terr. 445, 448, 17 P. 624 (1888). The

Timmerman Indictment thus contains a recitation of both the legal elements required for conviction and the specific conduct committed by the accused person.

In this case, the First Amended Information was deficient: it did not allege any particular facts relating to the charged crimes, other than the date and the county in which it ostensibly occurred. In particular, the

charging document failed to name the alleged victim of each count, to specify the weapon used, to describe the manner of the assault, or to describe the property damaged in the malicious mischief charge.

Because the charging document was factually deficient, need not demonstrate prejudice. *Kjorsvik, supra*. His convictions must be reversed, and the case dismissed without prejudice. *Id.*

II. MR. RIVAS’S MALICIOUS MISCHIEF CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT’S “TO CONVICT” INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF THE CRIME AS CHARGED.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *Schaler, at* 282. A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3). The court may also accept review of other issues argued for the first time on appeal, including constitutional errors that are not manifest. RAP 2.5(a); *see State v. Russell*, ___ Wash.2d ___, ___, ___ P.3d ___ (2011).

Jury instructions are reviewed *de novo*. *State v. Hayward*, 152 Wash.App. 632, 641, 217 P.3d 354 (2009). Instructions must be manifestly clear because juries lack tools of statutory construction. *See, e.g., State v. Kylo*, 166 Wash.2d 856, 864, 215 P.3d 177 (2009); *State v.*

Berg, 147 Wash.App. 923, 931, 198 P.3d 529 (2008); *State v. Harris*, 122 Wash.App. 547, 554, 90 P.3d 1133 (2004).

- B. A trial court must instruct the jury on every element of the charged crime.

A trial court's failure to instruct the jury as to every element of the crime charged violates due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wash.2d 422, 429, 894 P.2d 1325 (1995). A "to convict" instruction must contain all the elements of the crime, because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wash.2d 22, 31, 93 P.3d 133 (2004). The jury has the right to regard the "to convict" instruction as a complete statement of the law. Any conviction based on an incomplete "to convict" instruction must be reversed. *State v. Smith*, 131 Wash.2d 258, 263, 930 P.2d 917 (1997).

- C. Instruction No. 17 relieved the prosecution of its obligation to prove that Mr. Rivas damaged multiple items pursuant to a common scheme or plan.

In order to aggregate damage to multiple items into a single felony count of malicious mischief, the prosecution must allege and prove that the damage totaled more than \$750 and that it resulted from a common scheme or plan. RCW 9A.48.080; RCW 9A.48.100(2); *see also* WPIC 85.12 *and* Note on Use. In this case, the prosecution pursued a felony

charge under the theory that Mr. Rivas broke the windows of two vehicles (to exact revenge for similar damage done to his father's van), and that the damage to the two vehicles exceeded \$750. RP (10/18/10) 31-44.

Despite this, the court's "to convict" instruction allowed conviction on proof that the damage exceeded \$750, whether or not the two cars were damaged as part of a common scheme or plan. Instruction No. 17, Court's Instructions to the Jury, Supp. CP. This instruction did not make the state's burden manifestly clear to the average juror. *Kyllo*, 864.

Failure to instruct on an essential element requires reversal. *Smith, supra*. Constitutional error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000).

The error here is presumed prejudicial, and Respondent cannot meet its burden of establishing harmless error under the stringent test for constitutional error. *Toth*, at 615. Accordingly, Mr. Rivas's malicious

mischief conviction must be reversed and the case remanded for a new trial. *Id.*

III. MR. RIVAS WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

D. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wash. 2d 91, 109, 225 P.3d 956 (2010).

E. An accused person is constitutionally entitled to the 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 “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 appellant claiming ineffective assistance must show that “counsel’s performance fell below an objective standard of reasonableness and [that] counsel’s poor work prejudiced him.” *A.N.J.*, at 109. To establish prejudice, the appellant must show “a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, at 862.

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel’s performance. *State v. Reichenbach*, 153 Wash. 2d 126, 130, 101 P.3d 80 (2004). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

F. Defense counsel provided ineffective assistance by offering inadmissible hearsay testimony instead of calling the appropriate witness to corroborate Mr. Rivas’s account.

Trial counsel’s decision not to call a witness is generally presumed to be a matter of strategy; however, this presumption is overcome when

counsel fails to conduct an appropriate investigation. *State v. Weber*, 137 Wash.App. 852, 858, 155 P.3d 947 (2007). Failure to interview a witness who could “provide corroborating testimony may constitute deficient performance.” *Id.* In addition, the failure to cite proper authority or to follow proper procedure “can be grounds for finding ineffective assistance.” *State v. Hernandez-Hernandez*, 104 Wash.App. 263, 266, 15 P.3d 719 (2001); *See also State v. Horton*, 116 Wash.App. 909, 68 P.3d 1145 (2003).

Here, defense counsel knew of evidence confirming Mr. Rivas’s version of events and contradicting Bailey’s account. However, instead of offering the testimony through the 911 operator (who heard a male voice shout “Shoot the son of a bitch”), defense counsel took a shortcut by trying to introduce the evidence through Officer Makein, who heard the dispatcher relay the information. RP (10/18/10) 94, 98-99. Counsel’s error apparently resulted from a failure to properly investigate the case.⁸ RP (10/18/10) 94, 98-99.

The underlying statement itself was not hearsay: it was not (and could not be) offered for its “truth,” since it was a command, and not a

⁸ Counsel apparently believed the officer himself heard the command to shoot over the dispatch; in fact, the officer heard the dispatcher relay the information. RP (10/18/10) 94, 98-99.

factual statement. *See, e.g., United States v. White*, ___ F.3d ___, ___ (7th Cir. 2011) (“a command is not hearsay because it is not an assertion of fact.”) However, the dispatcher’s statement about what s/he overheard was undoubtedly an out-of-court statement offered to prove the truth of the matter asserted.⁹ ER 801, ER 802. Accordingly, the evidence would have been admissible through the dispatcher’s testimony, but was clearly inadmissible through Officer Makein’s testimony.

The defense theory of the case was that Mr. Rivas did not assault Bailey, and that Bailey (and Cranston) exaggerated what had occurred (possibly as part of an effort to cover up Bailey’s unlawful possession of the shotgun). The outcome of the case turned on whether the jury believed Mr. Rivas’s account sufficiently to raise a reasonable doubt about Bailey’s version of events.

The dispatcher’s testimony would have corroborated one detail of Mr. Rivas’s account. Because the dispatcher was a neutral party (unlike Mr. Perez, who acknowledged that he was a friend of Mr. Rivas), jurors were more likely to respect her or his testimony. Counsel was aware of this, and sought to introduce evidence of the shouted command to shoot.

⁹ The court’s characterization of the evidence as “double hearsay” was incorrect; only the dispatcher’s statement was hearsay.

There is a reasonable possibility that testimony from the dispatcher would have tipped the balance in Mr. Rivas's favor, and resulted in a different outcome. Counsel's failure to call the dispatcher was not a strategic choice, as can be seen by counsel's effort to introduce the evidence through Officer Makein.

Accordingly, counsel's deficient performance prejudiced Mr. Rivas. His assault conviction must be reversed and the case remanded for a new trial. *A.N.J., supra; Kylo, supra.*

G. Defense counsel provided ineffective assistance by failing to propose a proper "to convict" instruction.

The reasonable competence standard requires defense counsel to be familiar with the instructions applicable to the representation. *See, e.g., State v. Tilton*, 149 Wash.2d 775, 784, 72 P.3d 735 (2003); *State v. Jury*, 19 Wash. App. 256, 263, 576 P.2d 1302 (1978). A failure to propose proper instructions constitutes ineffective assistance of counsel. *State v. Woods*, 138 Wash. App. 191, 156 P.3d 309 (2007); *see also State v. Rodriguez*, 121 Wash. App. 180, 87 P.3d 1201 (2004).

In this case, the prosecution was required to prove that Mr. Rivas damaged multiple items as part of a common scheme or plan. RCW 9A.48.080; RCW 9A.48.100(2); *see also* WPIC 85.12 and Note on Use. A reasonably competent attorney would have been familiar with the

correct legal standard, and would have proposed instructions making clear that the prosecution bore the burden of proving a common scheme or plan. *Tilton, supra.*

There is “no conceivable legitimate tactic” explaining counsel’s failure to propose proper instructions. *Reichenbach, at* 130. Nor is there any indication in the record suggesting that counsel was actually pursuing a strategy that required him not to propose such instructions. *See Hendrickson, supra.*

Furthermore, counsel’s failure to propose a proper instruction prejudiced Mr. Rivas. A reasonable juror could have entertained doubts about whether or not Mr. Rivas was pursuing a common scheme or plan. However, because of counsel’s mistake, the jury was not able to properly evaluate this evidence: nothing in the court’s instructions made clear that the state bore the burden of establishing a common scheme or plan. Court’s Instructions to the Jury, Supp. CP.

The defense attorney’s failure to propose proper instructions deprived Mr. Rivas of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Tilton.* Accordingly, the conviction must be reversed and the case remanded for a new trial. *Id.*

CONCLUSION

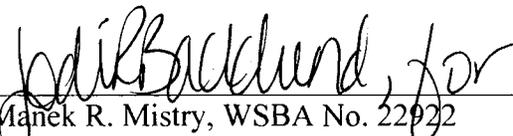
For the foregoing reasons, Mr. Rivas's convictions must be reversed and the case dismissed. In the alternative, the case must be remanded for a new trial.

Respectfully submitted on May 10, 2011.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to: *cm*

Benjamin Rivas, DOC #344874
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

and to:

Lewis County Prosecutors Office
345 W Main St Fl 2
Chehalis WA 98532-4802

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

All postage prepaid, on May 10, 2011.

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 10, 2011.



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