

No. 45918-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Sonja Hutchens,

Appellant.

Clark County Superior Court Cause No. 13-1-01009-7

The Honorable Judge John F. Nichols

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT..... 1

**I. Defense counsel provided ineffective assistance by
misinforming Ms. Hutchens regarding the effect of a
lesser-included instruction. 1**

**II. The court failed to make the self-defense standard
manifestly clear to the average juror by refusing to give
the “no duty to retreat instruction.” 4**

**III. The court ordered Ms. Hutchens to pay the cost of her
court-appointed attorney in violation of her right to
counsel. 7**

CONCLUSION 7

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

State v. A.N.J., 168 Wn.2d 91, 225 P.3d 956 (2010) 1, 2, 3

State v. Jordan, 158 Wn. App. 297, 241 P.3d 464 (2010)..... 4

State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009) 4

State v. McCreven, 170 Wn. App. 444, 284 P.3d 378 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013) 6

State v. Parker, 102 Wn.2d 161, 683 P.2d 189 (1984)..... 3

State v. Redmond, 150 Wn.2d 489, 78 P.3d 1001 (2003)..... 4, 5, 6, 7

State v. S.M., 100 Wn. App. 401, 996 P.2d 1111 (2000)..... 1, 2, 3

State v. Stowe, 71 Wn. App. 182, 858 P.2d 267 (1993)..... 1, 2, 3

State v. Vahey, 49 Wn. App. 767, 746 P.2d 327 (1987) 1

State v. Williams, 81 Wn. App. 738, 916 P.2d 445 (1996)..... 6

State v. Wilson, 113 Wn. App. 122, 52 P.3d 545 (2002) 1

WASHINGTON STATUTES

RCW 9A.52.020..... 1

ARGUMENT

I. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY MISINFORMING MS. HUTCHENS REGARDING THE EFFECT OF A LESSER-INCLUDED INSTRUCTION.

Defense counsel provides ineffective assistance by giving his/her client legal misinformation. *See e.g. State v. A.N.J.*, 168 Wn.2d 91, 116, 225 P.3d 956 (2010); *State v. S.M.*, 100 Wn. App. 401, 411, 996 P.2d 1111 (2000); *State v. Stowe*, 71 Wn. App. 182, 187, 858 P.2d 267 (1993).

A person does not have to be convicted of assault in order to be convicted of first degree burglary. RCW 9A.52.020; *see also State v. Vahey*, 49 Wn. App. 767, 746 P.2d 327 (1987) *overruled on other grounds as recognized by State v. Wilson*, 113 Wn. App. 122, 133, 52 P.3d 545 (2002).

Here, the record illustrates that defense counsel believed that Ms. Hutchens could not be convicted of first degree burglary if she was not also convicted of assault:

DEFENSE COUNSEL: the sort of legalistic reason for not [proposing a lesser-included for assault 4] is that, for Burglary 1, it require -- allows a Burglary 1 conviction for essentially any assault. So a lesser included could count for that. If we don't have a lesser included in, if we can prevail on the issue of self-defense in some form, then that would eliminate the Burglary 1 and the Assault 2.
RP 548.

Defense counsel informed the court that he had advised Ms. Hutchens of the relevant considerations. He said she chose to forego an instruction on the lesser-included offense. RP 548-49. Even so, the state claims that “it is clear that [counsel] did not advise his client that if she were acquitted of assault that she would be acquitted of burglary...” Brief of Respondent, p. 9. Respondent does not point to any part of the record which provides such clarity. Brief of Respondent, p. 9. Indeed, defense counsel explained Ms. Hutchens’s reasoning for foregoing the lesser-included instruction to the court at length. RP 548-49. Ms. Hutchens’s decision was based on inaccurate legal information from her attorney.

Counsel provides deficient performance by misleading his/her client in a manner that leads to misinformed decision-making. *See e.g. A.N.J.*, 168 Wn. 2d at 116; *S.M.*, 100 Wn. App. at 411; *Stowe*, 71 Wn. App. at 187. Still, the state argues that Ms. Hutchens’s attorney did not perform deficiently because the decision to forego a lesser-included can be a reasonable trial strategy. Brief of Respondent, pp 10-11. But client decisions to take advantage of a plea bargain in *A.N.J.*, *S.M.*, and *Stowe* could also have been reasonable *but for the fact that they were based on inaccurate legal advice. Id.* Ms. Hutchens’s attorney provided deficient performance by affirmatively misrepresenting the effects of the lesser-included instruction to his client. *Id.*

Defense counsel's deficient performance prejudices the accused if it causes him/her to waive rights based on misinformation. *See e.g. A.N.J.*, 168 Wn.2d at 116; *S.M.*, 100 Wn. App. at 412; *Stowe*, 71 Wn. App. at 188. Additionally, the fact that a person was convicted of a greater offense is irrelevant to the analysis of whether s/he was prejudiced by the lack of an instruction on a lesser offense. *See State v. Parker*, 102 Wn.2d 161, 163, 683 P.2d 189 (1984) ("Inasmuch, then, as the law gives the defendant the unqualified right to have the inferior degree passed upon by the jury, it is not within the province of the court to say that the defendant was not prejudiced by the refusal of the court to submit that phase of the case to the jury").

Nonetheless, the state argues that Ms. Hutchens was not prejudiced by her attorney's misadvice because the jury would not have convicted her for assault 2 unless they felt the elements had been proved. Brief of Respondent, p. 11. Respondent misunderstands the prejudice analysis. Ms. Hutchens was prejudiced by her attorney's misinformation because it caused her to forego her "unqualified right" to have the jury pass upon the lesser charge. *Parker*, 102 Wn.2d at 163; *A.N.J.*, 168 Wn.2d at 116. She does not need to demonstrate that the greater charge was unsupported by sufficient evidence to prevail on her ineffective assistance claim. *Id.*

Defense counsel provided ineffective by misleading Ms. Hutchens about the law, causing her waive her right to an instruction on a lesser-included offense. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Ms. Hutchens’s assault conviction must be reversed. *Id.*

II. THE COURT FAILED TO MAKE THE SELF-DEFENSE STANDARD MANIFESTLY CLEAR TO THE AVERAGE JUROR BY REFUSING TO GIVE THE “NO DUTY TO RETREAT INSTRUCTION.”

In Washington, a person who believes she is being attacked has no duty to retreat. She is entitled to use force in self-defense. *State v. Jordan*, 158 Wn. App. 297, 301 n. 6, 241 P.3d 464 (2010). Here, the court erred by refusing to instruct the jury that Ms. Hutchens did not have a duty to retreat. *State v. Redmond*, 150 Wn.2d 489, 495, 78 P.3d 1001 (2003). .

It is reversible error for a court to fail to instruct the jury on the “no duty to retreat” rule in any case in which “a jury may objectively conclude that flight is a reasonably effective alternative to the use of force in self-defense.” *Redmond*, 150 Wn.2d at 495. Even so, the state argues that the instruction was not necessary in this case because the primary issue for the jury was that of who initiated the fight. Brief of Respondent, pp. 13-15. But this fight occurred in a relatively empty parking lot and (under the defense theory) was initiated by a person who was sitting in a car. RP 331-32, 360, 424-25. The jury could reasonably have determined that Ms. Hutchens should have walked away from the confrontation. The fact that

her ability to retreat was not a major issue at trial is inapposite. *Redmond*, 150 Wn.2d at 495. Respondent misapprehends the standard.

Additionally, the “no duty to retreat” instruction is particularly crucial when the prosecutor argues in closing that the accused had an opportunity to flee from assault by the alleged victim. *Redmond*, 150 Wn.2d at 494 n. 3. The prosecutor made the following argument at Ms. Hutchens’s trial:

... we are taught as children to walk away from confrontation, to use words instead of violence, to turn the other cheek...
Unfortunately, the Defendant, Sonja Hutchens couldn’t do that.
RP 581-82.

The clear import of this argument is that Ms. Hutchens should have walked away. The prosecutor went on to argue that, even if the jury believed Ms. Hutchens’s version of events, she used more force than necessary because “she walked towards Ms. Earnhardt after [she was attacked]. She engaged.” RP 593. This argument, likewise, implies that Ms. Hutchens could have retreated rather than acting in self-defense.

Still, the state claims that the prosecutor never argued that Ms. Hutchens had a duty to retreat. Brief of Respondent, pp. 13-14.
Respondent misreads the record.

Instructions that fail to make the self-defense standard manifestly clear to the average juror are presumed prejudicial. *State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 378 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). Nevertheless, the state argues that any error was harmless. Brief of Respondent, p. 15 (*citing State v. Williams*, 81 Wn. App. 738, 744, 916 P.2d 445 (1996)). Again, Respondent relies on the contention that “the issue was never whether Hutchens should have retreated.” Brief of Respondent, p. 15. But the *Williams* court found failure to give the instruction prejudicial even though the primary issue in that case was whether the accused was the primary aggressor rather than whether the accused could have retreated. *Williams*, 81 Wn. App. at 744. Similarly, the *Redmond* court found that the court’s failure to give a “no duty to retreat” instruction was not harmless even though the evidence of self-defense was very slim. *Redmond*, 150 Wn.2d at 495.

As outlined above, the facts of this case and the prosecutor’s arguments permitted the jury to infer that Ms. Hutchens’s use of force was not reasonable because she could have walked away. The state cannot overcome the presumption of prejudice flowing from the court’s refusal to give the instruction. *McCreven*, 170 Wn. App. at 462; *Williams*, 81 Wn. App. at 744.

The court erred by refusing to instruct the jury that Ms. Hutchens had not duty to retreat. *Redmond*, 150 Wn.2d at 493-95. Ms. Hutchens's convictions must be reversed. *Id.*

III. THE COURT ORDERED MS. HUTCHENS TO PAY THE COST OF HER COURT-APPOINTED ATTORNEY IN VIOLATION OF HER RIGHT TO COUNSEL.

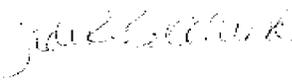
Ms. Hutchens relies on the argument set forth in her Opening Brief.

CONCLUSION

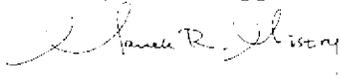
For the reasons set forth above and in Ms. Hutchens's Opening Brief, her convictions must be reversed. In the alternative, the order requiring her to pay attorney's fees must be vacated.

Respectfully submitted on November 5, 2014,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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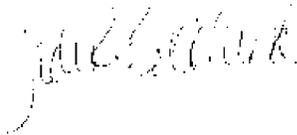
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 November 5, 2014.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

November 05, 2014 - 12:46 PM

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