

29288-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTONIO PONCE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF FRANKLIN COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENT OF ERROR

1. The court abused its discretion in refusing to give the defendant's proposed jury instruction:

A person has not entered or remained unlawfully in a building if the person reasonably believed that the owner of the premises or other person empowered to license access to the premises would have licensed the defendant to enter or remain.

The State has the burden of proving beyond a reasonable doubt that the trespass was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

(CP 148)

B. ISSUE

1. Evidence showed that the accused, who had been charged with burglary, believed employees who were authorized to do so had admitted him to the premises. Did the court err in refusing to instruct the jury that if a person reasonably believes he has been permitted to enter the premises by a person who is authorized to admit him, then his entering or remaining is not unlawful?

C. STATEMENT OF THE CASE

Police officer Corey Smith responded to a silent alarm call about 9:00 p.m. on a November night. (RP 135) He parked nearby, walked to the east side of the building and came to two bay doors with windows. (RP 135) A truck was parked within a foot of the building. (RP 136) He went to peek through the windows, turned on his flashlight and promptly heard a loud clank from inside. (RP 136)

He saw a man inside walking toward him. (RP 137) The man came through a door behind the truck, squeezed between the truck and the building, and approached Officer Smith. (RP 137) The officer ordered the man to the ground, handcuffed him, and placed him in the patrol car. (RP 137) As they were approaching the patrol car, the man told him that there had been other men with him, but that they had left and gone to a nearby house. (RP 138)

After other officers had arrived, Officer Smith returned to his patrol car and asked the man what he was doing there. (RP 139) The man explained there was a Honda outside the building and that he had gotten the phone number, called and talked to two employees at the shop. (RP 139, 160) He said they had offered to meet him at the building and show him the car. (RP 139, 161) One of them had keys and let him into the building, but then they left and went to some house. (RP 140) He said he

had been in the building for about twenty minutes when the officer arrived. (RP 140)

Pedro Medina, who owned the business in the building, arrived on the scene. (RP 213, 220) He saw that a window had been broken, and some of his tools were missing. (RP 221-22)

Mr. Ponce was tried on a charge of second degree burglary, RCW 9A.52.030. (CP 235)

Diane Houck and Jorge Rodriguez, who lived across the street from the building, testified that they had heard someone running and jumping outside their house just before Mr. Rodriguez saw that police cars had arrived at the building. (RP 75, 114)

Officer Smith testified that he had confirmed there was a Honda parked outside the shop, but that Mr. Ponce had told him conflicting stories about how he came to be inside the building. (RP 140, 152-53) Officer Smith said that Mr. Ponce had given him the names of two of the men who were allegedly employees and had let him into the building, but Mr. Medina told the officer he had no employees with those names. (RP 140-42, 157) According to Officer Smith, Mr. Ponce identified Mr. Rodriguez as the man who had let him into the building with keys, but Mr. Rodriguez testified that he had never seen Mr. Ponce before and did not

have any keys to the building. (RP 82, 152) Mr. Medina confirmed that he had the only keys to the building. (RP 215-16)

Defense counsel proposed a pattern jury instruction based on a statutory defense to criminal trespass, RCW 9A.52.090.¹ The proposed jury instruction read:

A person has not entered or remained unlawfully in a building if the person reasonably believed that the owner of the premises or other person empowered to license access to the premises would have licensed the defendant to enter or remain.

The State has the burden of proving beyond a reasonable doubt that the trespass was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

(CP 148)

¹ The statute provides, in relevant part:

In any prosecution under RCW 9A.52.070 and 9A.52.080, it is a defense that:

- (1) A building involved in an offense under RCW 9A.52.070 was abandoned; or
- (2) . . .
- (3) The actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him to enter or remain; . . .

RCW 9A.52.090.

The State proposed a similar instruction specifically limiting the application of the defense to the lesser included offense of criminal trespass:

It is a defense to a charge of criminal trespass in the first degree that:
the defendant reasonably believed that the owner of the premises or other person empowered to license access to the premises would have licensed the defendant to enter or remain.

The State has the burden of proving beyond a reasonable doubt that the trespass was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

(CP 170)

The court declined to give defendant's proposed instruction.

(RP 237) The jury found Mr. Ponce guilty of second degree burglary and he filed this appeal. (CP 5, 9)

D. ARGUMENT

1. THE DEFENDANT WAS ENTITLED TO A JURY INSTRUCTION THAT A PERSON WHO REASONABLY BELIEVES HE HAS BEEN ADMITTED TO THE PREMISES BY ONE WHO IS AUTHORIZED TO DO SO HAS NOT ENTERED OR REMAINED UNLAWFULLY.

Mr. Ponce's theory of the case was that he had been admitted to the building by individuals he believed were employees who were licensed

to let him enter. By refusing to give his requested instruction, and by giving the State's proposed instruction, the court not only deprived Mr. Ponce of the opportunity to argue this defense, but implied that such a defense could only be considered in connection with the lesser included trespass offense.

Alleged errors of law in jury instructions are reviewed *de novo*. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). The right to due process of law requires that the jury be fully instructed on the defense theory of the case. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Jury instructions are sufficient where they allow the parties to argue their theories of the case, are not misleading, and properly inform the jury of the applicable law. *Barnes*, 153 Wn.2d at 382. A trial court's refusal to give a proposed jury instruction is reviewed for an abuse of discretion. *In re Det. of Pouncy*, 168 Wn.2d 382, 390, 229 P.3d 678 (2010).

The Washington Supreme Court has explained the effect of RCW 9A.52.090. *City of Bremerton v. Widell*, 146 Wn.2d 561, 570, 51 P.3d 733 (2002). The court stated that “[s]tatutory defenses to criminal trespass negate the unlawful presence element of criminal trespass,” and “once a defendant has offered some evidence that his or her entry was

permissible[,] ... the State bears the burden to prove beyond a reasonable doubt that the defendant lacked license to enter.” *Id.*

In *State v. J.P.* this court determined that *Widell* permitted a defendant to use an abandonment defense to residential burglary. *State v. J.P.*, 130 Wn. App. 887, 895, 125 P.3d 215 (2005). The court explained that “[c]riminal trespass is a lesser included offense to burglary ... [because] [r]esidential burglary is a criminal trespass with the added element of intent to commit a crime against a person or property therein.” *Id.* The court held that, because the unlawful entry component of the burglary statute and the criminal trespass statute are the same, the abandonment defense could be used by defendants in burglary cases. *Id.*

That the building has been abandoned and that a person licensed to do so has invited the accused to enter are alternative defenses to burglary because they negate the element of unlawful entry or unlawful presence. *Widell* and *J.P.* dictate that, once witnesses had testified to Mr. Ponce’s claim that employees of the business had admitted him to the building, the State was required to prove beyond a reasonable doubt that he lacked license to enter.

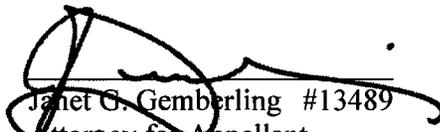
In refusing to give the proposed instruction, the court failed to fully instruct the jury on the defense theory of the case and the applicable law and prevented him from arguing his theory of the case.

E. CONCLUSION

The court should reverse the conviction and remand this case for trial before a properly instructed jury.

Dated this 10th day of March, 2011.

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