

FILED

JUL 26 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 30236-9-III

STATE OF WASHINGTON
COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

ELUTERIO MORFIN-CAMACHO

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR
FRANKLIN COUNTY

BRIEF OF RESPONDENT

SHAWN P. SANT
Prosecuting Attorney

by: **Brian V. Hultgrenn, #34277**
Deputy Prosecuting Attorney

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Pasco, WA 99301
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A. COUNTER STATEMENT OF THE ISSUES

1. ARE THE TRIAL COURT'S FINDINGS, BOTH ORAL AND WRITTEN, SUFFICIENTLY SPECIFIC TO ALLOW REVIEW OF THE COURT'S CONCLUSIONS ON THE DETERMINATIVE FACTUAL MATTERS, AND IF NOT, DID THE LACK OF SPECIFICITY PREJUDICE THE APPELLANT?
2. DID THE STATE ALLEGE AND PROVE ALL ESSENTIAL ELEMENTS OF FAILURE TO STOP AND IDENTIFY AT THE SCENE OF AN ACCIDENT: UNATTENDED?
3. DOES SUFFICIENT EVIDENCE SUPPORT APPELLANT'S CONVICTIONS FOR MALICIOUS MISCHIEF IN THE SECOND DEGREE, TAKING A MOTOR VEHICLE WITHOUT PERMISSION IN THE SECOND DEGREE AND FAILURE TO STOP AND IDENTIFY AT THE SCENE OF AN ACCIDENT: UNATTENDED?
4. DID THE APPELLANT'S TRIAL COUNSEL EFFECTIVELY PRESENT THE APPELLANT'S THEORY OF THE CASE BY RAISING THE DEFENSE OF NECESSITY INSTEAD OF THE DEFENSE OF DURESS?

B. RESPONSE TO THE STATEMENT OF THE CASE

On March 22, 2011, Pasco Police responded to 2634 North 4th Avenue, Pasco, Washington. (RP 8). At that location, police discovered a damaged potato truck. (RP 9). After several minutes, the Appellant, Eluterio Morfin-Camacho, walked up and made contact with the officers. (RP 10). The Appellant told police he had begun the night by meeting his girlfriend at the Motel 6 in Pasco, Washington. (RP 13). He initially refused to tell police the name of the girlfriend, then lied to them and told police her name was Ericka. (RP 13). Law enforcement later determined her true name was Rose. (RP 73). After spending some time at Motel 6, the Appellant said he met two males and agreed to go party with them. (RP 13, 92-93). He then drove with Rose to the Airport Motel, with the two individuals following them. (RP 54). Once at the location he got into a vehicle with the two strangers. (RP 54). He described one of the males, the driver, as having a deformed arm. (RP 13).

Once inside two individuals' vehicle, they drove him outside the city, pointed a black gun at him, and robbed him of his clothing and property. (RP 11, 14). After releasing him, the two individuals

drove back down the road in the direction of the Airport Motel. (RP 52).

Alone and unclothed, the Appellant entered a nearby potato shed without permission. (RP 11, 80, 99). The Appellant found a potato truck inside and deliberately drove the truck through the shed's rolling metal door. (RP 100-103). The Appellant did not have permission to use the truck and the collision with the door caused approximately \$1,200.00 to \$1,300.00 worth of damage. (RP 26, 43).

As soon as the Appellant reached the road he drove back to the Airport Motel (where he had previously been abducted by the two men) because he was in fear that the two men would return and kill him if he stayed in area they had left him. (RP 52-55). On his way back to the motel the Appellant passed one pay phone and parked in close proximity to another pay phone. (RP 53). The Appellant was aware of the location of the police station approximately a mile from the Airport Motel but chose not to go there. (RP 70). At the Airport Motel, the Appellant contacted the manager and asked to use the phone, but did not ask that the police be called. (RP 32). According to the Appellant, the purpose

of his return to the motel was to look for his female companion, Rose. (RP 69). He eventually borrowed a phone from an individual at the location and used it to call his friend in lieu of police (RP 105).

Franklin County Sheriff's Sgt. Jim Dickinson responded to 10 Clark Road, Franklin County, Washington, where he took over the investigation from Pasco Police officers. (RP 47). At that location he observed that a large roll up door from a potato shed had been demolished and left lying among debris outside the shed. (RP 47). Sgt. Dickinson took custody of the Appellant and stopped at the Airport Motel to observe and photograph the damaged potato truck there. (RP 48). The Appellant confirmed that the damaged truck had been the one he had taken from 10 Clark Road to allegedly escape his abductors. (RP 48).

The Appellant was interviewed by multiple law enforcement officers. (RP 10, 49, 67). During the Appellant's final statement to Detective Jason Nunez, the Appellant's story changed continuously. (RP 70). Sgt. Dickinson indicated during his interview the Appellant appeared to have mood swings and smelled of intoxicants. (RP 56-57). At one point the Appellant became

combative and indicated to Sgt. Dickinson that he could die in the course of his duties, like his colleague had done previously. (RP 57).

After being in jail for several days the Appellant reported that his cellmate had been one of the abductors, the driver. (RP 58). Sgt. Dickinson made contact with the Appellant and took the report. (RP 58-60). The Appellant said that the individual had been arrested on gun charges and requested the Sgt. check his cellmate's property, and the evidence from his cellmate's underlying case, to see if the gun from the case or the property in evidence matched what had been taken from him. (RP 59-60). None of his former cellmate's property matched the description given by the Appellant. (RP 61). When the Sgt. interviewed the cellmate he showed surprise at the allegations. (RP 61). The cellmate did not have any deformities with his arms. (RP 61). When shown pictures of the gun from his cellmate's case, the Appellant acknowledged he could not identify the gun used in the his cellmate's crime as the weapon used on him that night and that the gun he described was an automatic while his cellmate's weapon was a revolver. (RP 122-23).

During closing arguments the Appellant initially said the State had not met its burden on several elements. (7/13/2011 RP 4). However, the Appellant did not offer any details and spent the remainder of the argument arguing necessity. (7/13/2011 RP 4-8). At the conclusion of the Appellant's closing argument his counsel asked their paramount question: "why else would my client be out in a potato shed naked in his underwear in the middle of the night? Why else would he take this truck and drive directly to a location where there are people?" (7/13/2011 RP 7).

The judge specifically addressed those questions with his ruling on the case:

[o]ne of the things that is crucial in this case is the evaluation and credibility of Mr. Camacho. And the Court has to take into account his manner and memory while testifying, his general vagueness and evasiveness and his inconsistency. And frankly he's not a great witness. He gives me the impression that he's a man who's just willing to say whatever he needs to say to suit his purposes... And so he's not a very credible person.(RP 131-32).

The judge later agreed to give him the benefit of the doubt on the burglary charge, but concludes "I don't give a lot of weight to his story." (RP 132).

The trial judge then goes on to point out the Appellant showed a “terrible disregard for the property of the owners of the building” and that the Appellant had not been in “any way justified in driving the truck away and driving it through the building... This is totally irrational behavior in my opinion” (RP 133). He also stated he did not believe any of the Appellant’s excuses for not calling in the accident. (RP 132). At sentencing the Appellant’s trial counsel specifically pointed out that the Appellant must simply make reasonable efforts to contact law enforcement as soon as possible, and that the Appellant had no way to do so because of the circumstances. (RP 136). The trial judge heard the objection and chose to enter the findings of fact and conclusions of law which did not reflect with the Appellant’s argument on the facts.

C. RESPONSE TO ARGUMENT

1. **THE TRIAL COURT’S FINDINGS, BOTH ORAL AND WRITTEN, ARE SUFFICIENTLY SPECIFIC TO ALLOW REVIEW OF THE COURT’S CONCLUSIONS, AND EVEN IF THE FINDINGS LACKED SPECIFIITY, IT DID NOT PREJUDICE THE APPELLANT.**

When a case proceeds to trial without a jury the court is required to enter findings of fact and conclusions of law. CrR 6.1(d). "Each element must be addressed separately, setting out the factual basis for each conclusion of law." State v. Banks, 149 Wash.2d 38, 43, 65 P.3d 1198, (2003). Oral statements made during the court's ruling cannot be used to impeach written findings of fact and conclusions of law, but when consistent can be read to shed additional light on written findings. Rutter v. Estate of Rutter, 59 Wash.2d 781, 784, 370 P.2d 862 (1962).

The plain language of CrR 6.1(d) does not specifically set out the amount of detail required in the findings. The best way to determine the extent and nature of the findings of fact and conclusions of law is to look at the disputed facts in the case:

where findings are required, they must be sufficiently specific to permit meaningful review. While the degree of particularity required in findings of fact depends on the circumstances of the particular case, they should at least be sufficient to indicate the factual bases for the ultimate conclusions. The purpose of the requirement of findings and conclusions is to insure the trial judge 'has dealt fully and properly with all the issues in the case before he decides it and so that the parties involved and this court on appeal may be fully informed as to the bases of his decision when it is made.' However, a trial court is not required to make findings of fact on all matters about which there is evidence in the record;

only those which establish the existence or nonexistence of *determinative* factual matters need be made. In re Detention of Labelle, 107 Wash.2d 196, 218-19, 728 P.2d 138 (1986) (citations omitted)(emphasis added).

An example of this principle can be found in State v. Banks, 149 Wash.2d 38, 65 P.3d 1198, (2003). In that case, the defendant was charged with Unlawful Possession of a Firearm. Id. During the trial, witnesses testified that they never actually saw the defendant with the firearm in hand and the defendant claimed he had no knowledge of the firearm police found in his car. Id. at 40-42. Banks' trial counsel argued in closing that the evidence showed that the gun did not belong to Banks, therefore Banks had no knowledge of the gun present in his car. Id. at 41. The court found circumstantial evidence outweighed the defendant's claim that he lacked knowledge of the firearm and found him guilty. Id.

The determinative issue in Banks' trial turned around whether or not the defendant had knowledge of the firearm in his vehicle. Id. Banks made his theory of the case that he lacked mens rea as to the element of knowledge of the gun. When the trial court left out a specific mens rea factual finding, the court failed to specifically answer the defendant's defense. Looking at

the case as a whole, the result depended on the issue of the defendant's knowledge. The court had to decide the knowledge element to deal "fully and properly with all the issues in the case." Labelle at 219. In that instance, because the findings did not specifically mention knowledge, the defendant's main defense, the Court found error. Id. at 43. It then proceeded to a harmless error analysis which upheld the conviction because the finding of knowledge was implicit within the court's ruling. Id. at 46. The trial court's omission did nothing to prejudice Banks because the trial court's finding of guilty necessitated an inference of intent that was obvious. Id. at 46.

This case carries a sharp distinction from Banks because the Appellant does not argue the mens rea elements in his actual defense. Although the Appellant claims he argued the mens rea elements of the case, an actual review of the record shows the Appellant conceded all the elements of the crimes alleged in order to pursue his overall theory of the case, necessity. The necessity defense is an affirmative defense requiring the defendant to show by preponderance of the evidence that the "defendant reasonably believed the commission of the crime was necessary to avoid or

minimize a harm.” WPIC 18.02. The defendant must show that “the harm sought to be avoided was greater than the harm resulting from violation of the law.” Id. In other words, to effectively utilize necessity, a defendant must show he weighed the options available to him, and deliberately made a choice of the lesser of two evils.

The Appellant argued this defense at trial, saying he had to take a motor vehicle without permission, smash through a closed shed door, and proceed without stopping to another location in order to avoid death at the hands of his abductors. The harm being avoided, death, being greater than the harm of theft, damage to personal property, and failure to report the damage to police. The Appellant’s entire argument is premised on deliberate choice. He testified that he took the truck without the owner’s permission because he thought he heard the alleged abductor’s vehicle returning to the scene. The Appellant had a motive for taking the truck, fear of being caught by his alleged abductors. By sharing his reasoning, the Appellant testified that intent was intrinsic in his actions. A person cannot do something for a reason without intent.

Likewise, the Appellant gives a reason for his intentional actions when breaking through the potato shed’s door. He claims

“it was either the door or me, you know. I’d rather pay the damages than have somebody pay my funeral, you know.” This description aptly describes his intent to cause damage to escape alleged danger. It acknowledges that he knew he would damage another’s property, but disregarded that because he felt his life was in jeopardy. If not acting intentionally, the Appellant would have no explanation for his actions.

The Appellant also makes no qualms about his deliberate choice not to immediately call police. He claims he was not able to contact them for a variety a reasons. The Appellant had no phone, that the owner of the phone he eventually used did not allow him to call police, or that he had to find his girlfriend immediately before contacting police. These reasons for not immediately calling police acknowledge he knew an accident had occurred. The knowledge of the occurrence is a necessary precursor for him to explain why he did not call police. If he did not know about the accident, he would have needed no explanation as to why he did not call police.

The Appellant argues that he denied having the necessary mental culpability at trial. This is not born out in the record. At no point during his testimony did he indicate he did not intend or have

knowledge of his specific actions. He simply explains why he deliberately took those actions. The law of necessity does not require the Appellant concede the mens rea elements of the crimes. However, in order to make his necessity defense at all logical or credible, the Appellant had to sacrifice those elements. To not do so would have meant crossing the line into an even more absurd explanation of the events on the night in question.

“[T]he degree of particularity required in findings of fact depends on the circumstances of the particular case, they should at least be sufficient to indicate the factual bases for the ultimate conclusions.” Labelle, 107 Wash.2d 218-19. The findings do not interlineate the specific mens rea elements, but these elements are not in dispute. The Appellant had to have the trial court accept these elements to even have his theory of necessity be considered. The ultimate conclusion and determining fact in the case pivoted on whether the trial court believed the defendant's theory of necessity. The findings indicated the court did not.

In any event, even if one finds the trial court's findings of facts in error, such error is certainly harmless. “The test to determine whether an error is harmless is ‘whether it appears

beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” Banks, 149 Wash.2d at 44. In explaining the practical application of this rule, the Banks court describes a United State’s Supreme Court case which also dealt with whether a missing element caused error. Id. at 45. State v. Neder considered a situation where the materiality element of a tax and bank fraud charge had not been submitted to the jury, “but instead was decided by the trial court.” 527 U.S. 1, 6, 119 S.Ct. 1827 (1999). The Court found the error harmless because the omitted element was “uncontested and supported by overwhelming evidence.” Id. at 17.

Similarly, the mens rea elements of the crimes in questions are uncontested and supported by overwhelming evidence (including the Appellant’s own trial testimony). The Appellant’s defense of necessity was based entirely on his credibility with the court and whether the court believed his explanation for his erratic behavior on the night in question. Looking at the oral findings sheds additional light on the written findings. The court mentioned at least three times during its conclusion that it did not find the Appellant’s testimony credible. Specifically citing the mens rea

elements in the written findings certainly would not have changed the court's opinion of the Appellant's less than believable testimony. The Appellant fails to cite any compelling reason why specifically identifying the mens rea elements by name would have affected the outcome of the verdict or his ability to appeal that verdict.

2. THE STATE ALLEGED AND PROVED ALL ESSENTIAL ELEMENTS OF FAILURE TO STOP AND IDENTIFY AT THE SCENE OF AN ACCIDENT: UNATTENDED, IN ADDITION TO AN EXTRA ELEMENT.

The Court states "where, as here, an information is challenged for the first time on appeal, it is liberally construed in favor of validity. State v. Zillyette, 173 Wash.2d. 784, 786, 270 P.3d 589, (2012). "Under this construction, the court first asks whether the necessary facts appear, or can be found by fair construction, in the information. If so, the court then inquires whether the defendant was nonetheless prejudiced by the unartful language used in the information. Id. "Even missing elements may be implied if the language supports such a result." State v. Campbell, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995).

WPIC 97.08 lays out the elements of the crime of Failure to Stop and Identify: Unattended. These elements are that (1) the defendant drove a vehicle on the date in question (2) the vehicle collided with property adjacent to any public highway, (3) the defendant knew of the accident, (4) the defendant failed to satisfy the following duties (a) take reasonable steps to locate the property owner and provide contact information or leave a note in a conspicuous place and (b) report the accident, and (5) that it occurred in the State of Washington. Id.

The Appellant appears to argue that the State mistakenly inserts RCW 46.52.110(1)'s "immediately stop" at the scene of the accident language in lieu of RCW 46.52.110(2)'s requirement a person must simply take reasonable steps to notify the owner or leave a note. This reading looks at the first part of the State's charging document but ignores the latter section. The Information alleges the Appellant "failed to immediately stop his vehicle at the scene of the accident or as close thereto as possible, *and locate or attempt to locate, and notify the operator or owner or person in charge of the damaged property of his name or address, or failed*

to leave in a conspicuous place upon the damaged property a written notice containing his name and address (emphasis added).

Under prong one of the Court's analysis of essential elements of an information, the court is to consider whether the elements appear by fair construction. The italicized language in the Information is substantially similar to the language used in the jury instruction for element 4(a). Although it leaves out the word "reasonable" it contains the allegations needed to notify the Appellant that he did not take the necessary steps to notify the owner of the property. The language complained of by the Appellant, "failed to immediately stop his vehicle at the scene of the accident," does not replace the necessary statutory language, it simply adds an unnecessary element to it. If State alleges an unnecessary element in an offense is merely surplusage and may be stricken from the information if noticed. State v. Worland, 20 Wash.App. 559, 565-66, 582 P.2d 539 (1978). If incorporated into the jury instructions, such elements may become the law of the case. Id. at 566. This is not relevant in the current instance as jury instructions are not issued on bench trials and the judge gave no specific consideration to the unnecessary element.

The Appellant argues under RCW 46.52.010, he has a four day period to report an accident involving property. This is not accurate. The four day rule referred to by the Appellant in RCW 46.52.030(1), is not applied in lieu of other reporting requirements in RCW 46.52.010, but instead refers to what must be done in all cases where the “damage to the property of any one person to an apparent extent equal to or greater than minimum amount established by rule adopted by the chief of the Washington state patrol.” RCW 46.56.030. It does not give a person four days to take reasonable steps to notify the property owner, it simply add a requirement, that you must file a report, if the damage exceeds the minimum amount of damage specified by the state patrol.

Looking at the charging language as a whole, all the elements of the statute can be found by fair construction; the court then considers whether the unartful language used in the information caused prejudice. Zillyette, 270 P.3d at 590. In this case, no prejudice can be found. The issues of what steps the Appellant took to report the matter, and whether they were reasonable, was decided by the court despite the unartful language. The Appellant testified and gave his explanation as to

why he did not contact police. Both he and law enforcement witnesses agreed the accident was not reported until police contacted the Appellant on their own accord at the Airport Motel and questioned him. The court then specifically stated these reasons were not rational and the court did not believe them. No prejudice ensued because the issue was fully litigated and resolved. A change in the language of the information could not have altered that result.

3. SUFFICIENT EVIDENCE SUPPORTED EACH OF THE APPELLANT'S THREE CONVICTIONS

The Appellant's argument of insufficient evidence rests on the Appellant's version of events on the night in question. This version of the events was presented to the trial court and rejected. Applying the proper burden upon review, his version of events likewise fails:

[t]he test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilty beyond a reasonable doubt. When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all inferences that

reasonably can be drawn therefrom. State v. Salinas, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992) (citations omitted).

Taking all reasonable inference of facts, the Appellant has no necessity defense and no explanation for why he committed the crimes in question. The Appellant mistakenly reads intent to encompass the idea of necessity within itself. He claims the actions he intended were not criminal because his motivation was pure (that being his survival). Setting aside the idea that the court rejected that claim, this means the Appellant still intended the criminal acts in question. Necessity is an affirmative defense; a legal excuse for committing criminal acts. It does not erase mens rea elements like knowledge and intent from the criminal acts, it simply holds a defendant not criminally liable for them.

The Appellant's objective purpose was to commit the crimes in question. His reason for committing the crimes was discounted as irrational and unreliable by the trial court. The trial court had the ability to observe the Appellant on the witness stand and weigh the credibility of his testimony; they are in the best position to consider whether actual necessity existed. They determined it did not.

4. THE APPELLANT'S TRIAL COUNSEL EFFECTIVELY PRESENTED THE APPELLANT'S THEORY OF THE CASE

The standard of review for ineffective assistance of counsel is de novo. State v. White, 80 Wash.App. 406, 410, 907 P.2d 310 (1995). However, the Supreme Court has underlined the importance of taking a measured and deferential approach to examining a defense counsel's trial strategy:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, supra, 350 U.S. at 101, 76 S.Ct., at 164. State v. Strickland, 466 U.S. 668, 689, 104 S.Ct. 2052 (1984).

In order for the appellant to show he received ineffective assistance of counsel he must satisfy a two pronged test. State v. McFarland, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995). The first step for the appellant is to show that “defense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances...” Id. In considering this factor the courts “engage in a strong presumption counsel’s representation was effective. Id. at 335. Indeed, the burden is on the appellant in this case to demonstrate, based on the available record, that his trial defense counsel was ineffective. Id. The second prong the appellant must satisfy is to make a showing that “defense counsel’s deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id.

For the appellant to satisfy the first prong and show there is that deficient representation he must show that there is “no legitimate strategic or tactical reasons” for the trial defense counsel to have made his decision. State v. Rainy, 107 Wash.App 129, 135-36, 28 P.3d 10 (2001).

In this instance, the tactical reason for choosing necessity over duress was based on the facts the Appellant had relayed to law enforcement and his counsel since the day of his arrest. To claim duress, the defendant must participate in a crime under “compulsion by another” under “fear of death or grievous bodily injury.” WPIC 18.01. The Appellant in this case never claimed to be under compulsion. According to his story, he was dropped off and left by his alleged abductors. He never made the claim his abductor specifically compelled him to steal a vehicle and drive it through a potato shed door.

In State v. Turner, the case cited by the Appellant, the defendant, at the behest of another person, smuggled drugs into a prison. 42 Wash.App 242, 243-44, 711 P.2d 353 (1985). The defendant argued at trial that another individual required her to smuggle the drugs into the prison by threatening her husband and her family.” Id. Duress involves instances where an individual, like the defendant in Turner, is required to do something illegal by another via threat. This is clear in the language in the relevant jury instruction: “[t]he defendant participated in the crime under compulsion by another who by threat or use of force created an

apprehension in the mind of the defendant that *in case of refusal* the defendant would be liable to immediate death or immediate grievous bodily harm.” WPIC 18.01 (emphasis added). The key language is “in case of refusal.” This language obviously refers to a request being made and the defendant being unable to refuse that request. Clearly, the authors of the WPIC intended this for a direct threat requiring specific action.

In this case the Appellant claimed, not that his abductors made him steal a vehicle and crash it through a door, but that as a result of fear they would return, he took those actions. Neither person ever used a threat where “in case of refusal” he would have been killed. Therefore, the defense of duress would not be an appropriate instruction for this particular set of facts. The Appellant’s trial counsel used necessity because the language of that instruction is more appropriate. The Appellant could argue that “commission of the crime was necessary to avoid or minimize a harm.” WPIC 18.02.

In any event, even if a duress instruction should have been argued, the Appellant is unable to meet the second prong of the McFarland test to show ineffective assistance of counsel. The

second prong the appellant must satisfy is to make a showing that “defense counsel’s deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” McFarland at 334-35.

The Appellant fully argued his theory of the case and testified to his affirmative defense, *i.e.* his reason for taking the criminal actions. The trial court found it irrational and unconvincing. Applying a different tag to the defense, that of duress instead of necessity, would have done nothing to change the courts view of the facts presented and would have done nothing to remedy the Appellant’s lack of credibility with the court.

D. CONCLUSION

The Appellant makes a series of procedural challenges to the trial courts decision. Regardless of the strength of those challenges, the substance of his defense still stands dismissed and discredited before the court. Even if any error is found and determined prejudicial, any errors can be readdressed by the trial court on remand, and can be answered consistent with the original ruling, at no prejudice to the Appellant. On the basis of the

arguments set forth herein, it is respectfully requested that the decision of the Superior Court for Franklin County be affirmed.

Dated this 24th day of July.

Respectfully submitted,
SHAWN P. SANT #35535\91039
Prosecuting Attorney for
Franklin County

by: 
Brian V. Hultgrenn,
WSBA #34277
Deputy Prosecuting Attorney

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
County of Franklin) SS.

COMES NOW Abigail Polomsky, being first duly sworn on oath, deposes and says:

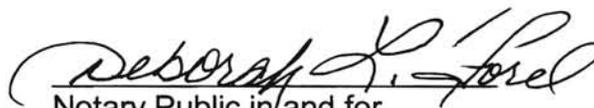
That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 24th day of July, 2012, a copy of the brief of respondent was delivered to Eluterio Morfin-Camacho, Appellant, *Appellant's Address* and to 624 West Shoshone, Pasco

WA 99301, opposing counsel, Kristina M. Nicholas, P.O. Box 19203,
Spokane, WA 99219-9203 by depositing in the mail of the United
States of America a properly stamped and addressed envelope

A handwritten signature in black ink, appearing to read "Alan Priddy", written over a horizontal line.

Signed and sworn to before me this 24th day of July, 2012.

A handwritten signature in black ink, appearing to read "Deborah L. Ford", written over a horizontal line.

Notary Public in (and for
the State of Washington,
residing at Kennewick, WA
My appointment expires:
May 19, 2014