

COA NO. 64454-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

FRED BINSCHUS,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Charles R. Snyder, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Ineffective assistance of counsel deprived appellant of his constitutional due process right to a fair trial.

Issue Pertaining to Assignment of Error

Is reversal of the residential burglary conviction required because defense counsel was ineffective in failing to request a lesser offense instruction for first degree trespass?

B. STATEMENT OF THE CASE

a. Procedural History

The State charged Fred Binschus with residential burglary and second degree malicious mischief. CP 45-46. A jury found Binschus guilty on both counts. CP 23. The trial court imposed concurrent sentences of 53 months confinement for burglary and 14 months for malicious mischief. CP 2-3, 5. This appeal follows. CP 11-20.

b. Trial

Daniel Lonneker's Testimony:

In the early morning hours of April 2, 2009, Daniel Lonneker was in his apartment with girlfriend Rhonda Binschus. 2RP¹ 56-57, 60, 100. Rhonda Binschus is Fred Binschus's aunt. 2RP 57. Louie Bates called

¹ The verbatim report of proceedings is referenced as follows: 1RP - 4/14/09; 2RP - 10/27/09 & 10/28/09 (two consecutively paginated volumes); 3RP - 11/9/09.

Lonneker and asked to be picked up. 2RP 60, 101. Bates and Binschus's sister, Angie, had stayed with Lonneker a few weeks earlier before Angie developed complications with her pregnancy. 2RP 100-01. Bates was Angie's boyfriend. 2RP 101.

When Lonneker arrived, Bates asked Lonneker to bring Binschus back to his residence because Binschus had been drinking and needed a place to rest. 2RP 60-62. Lonneker was acquainted with Binschus and had gotten along with him in the past. 2RP 57-58.

The three returned to Lonneker's residence. 2RP 62. Lonneker invited Binschus inside. 2RP 85, 89-90.

Lonneker said Binschus had attention deficit hyperactivity disorder and was in a hyperactive state at the time. 2RP 62-63, 70. Binschus was concerned about his sister Angie, who was in the hospital due to pregnancy complications. 2RP 64-65, 100. He pulled one or two closet doors off their tracks. 2RP 67, 102, 114-15. He picked up a few things from a toolbox, including a hammer, walked around the apartment and then dropped them back down. 2RP 75-76, 90, 102-03. Binschus did not threaten anyone with these objects. 2RP 90. Lonneker could smell alcohol on Binschus's breath. 2RP 63.

Lonneker and Bates tried to shower Binschus to calm him down. 2RP 65-66, 76, 91. Binschus broke the glass in the bathroom cabinet,

pulled a shower curtain down and pushed on the bathroom door. 2RP 67-68, 91-92, 105-07. After the shower, Binschus continued to walk back and forth around the apartment. 2RP 93-94.

At that point, Lonneker told Binschus to leave because he had not calmed down. 2RP 86, 94. Binschus willingly went outside. 2RP 86-87.

Lonneker subsequently heard Binschus knocking on some doors upstairs and crying about his sister. 2RP 72, 95. Binschus broke the porch light. 2RP 95. Binschus then came back and knocked or pounded on Lonneker's window in an effort to find out how his sister was doing. 2RP 65, 96, 113. The window cracked and accidentally broke. 2RP 65, 71-72, 74, 96.

Binschus entered the apartment through the broken window. 2RP 65, 71-72, 74. He was crying about his sister and pacing around. 2RP 87, 96. Binschus was getting agitated. 2RP 97. Lonneker told Binschus he was going to call the police if he did not leave. 2RP 97.

Lonneker explained he no longer allowed Binschus in the apartment after Binschus broke the window. 2RP 85. "I picked him up, so he was allowed, and at the end when there's damage done and stuff, it was too much for me, and I told him to leave." 2RP 86. Binschus would not leave. 2RP 87.

Lonneker did not remember if Binschus was pounding on the bedroom door after Binschus came back in and he was otherwise unclear as to the timing of that event. 2RP 87-88. When the prosecutor walked Lonneker through the sequence of what happened after Binschus entered through the window, Lonneker did not include pounding on the bedroom door. 2RP 88-97.

Lonneker left the apartment and called 911 after Binschus came through the window. 2RP 71, 87, 97. He thought it was the only way to pay for the expense of the damaged window and to get Binschus some help. 2RP 72.

Lonneker spoke with Officer Andria Fountain upon her arrival. 2RP 69, 71. Lonneker told the officer that Binschus had damaged the bathroom door, broke part of the bathroom mirror and pulled down the shower curtain rod. 2RP 77, 79. He told the officer he momentarily hid in the bedroom. 2RP 79-80.

Lonneker testified Binschus had been going berserk inside, meaning he could not sit still. 2RP 71-72. Lonneker denied Binschus threatened him. 2RP 98. He did not remember telling the 911 operator that Binschus walked through the window with a hammer and threatened him. 2RP 98-99. He said such a statement would be a lie. 2RP 98. Binschus had no object in his hand when he came through the window.

2RP 118. Lonneker told the officer that Binschus came through the window like Superman. 2RP 119-20. Lonneker said he might have been exaggerating things in speaking with the officer. 2RP 118. He said he was tired and confused at the time. 2RP 69.

Rhonda Binschus's Testimony:

Rhonda Binschus spent time in the bedroom because she did not want to deal with "a bunch of drunks." 2RP 123, 134, 141-42, 150. She denied hiding from Binschus. 2RP 134, 150. Rhonda heard Binschus run in and out of the house, a struggle to put Binschus in the shower, a breaking bathroom mirror and the three men yelling. 2RP 125-26, 133, 141. Binschus pounded on the bedroom door while she was inside. 2RP 125-26. Binschus "pounded on the doors" before he broke through the window. 2RP 117. She did not know if Binschus caused a bow in the door or if it was already in that condition. 2RP 129.

She later saw Binschus come through the window "[l]ike he didn't know what he was doing," saying "my sister is in the hospital." 2RP 131. He did not have a hammer. 2RP 131. According to Rhonda, Binschus entered through the window and then went straight out the front door. 2RP 144, 147.

Officer Andria Fountain's Testimony:

According to computer dispatch, as relayed through officer Fountain's testimony, Lonneker called 911 and said a male had come crashing through his apartment window with a hammer and threatened him. 2RP 152, 180. Lonneker did not know the man, who was high on methamphetamine. 2RP 180, 195-96.

Officer Fountain spoke with Lonneker outside the apartment upon arrival. 2RP 152, 154. Lonneker said Binschus was "going berserk" inside the apartment. 2RP 154-55, 156. He also said his girlfriend was inside, and that Binschus had been holding his friend down and throwing stuff around. 2RP 155.

After calming down, Lonneker said Binschus had knocked on the door but was ignored. 2RP 161-63. Bates was inside the apartment. 2RP 163. Binschus broke the porch light and "Supermanned" through the window. 2RP 163. Binschus then broke the closet doors and threw things around the apartment. 2RP 163-64. Lonneker and Rhonda hid in the bedroom. 2RP 164. Binschus started ramming against the bedroom door. 2RP 164. Lonneker opened the bedroom door before it broke down. 2RP 164. Binschus forced his way into the bathroom and held Bates down. 2RP 164. Lonneker then fled the apartment and called 911. 2RP 164. In a subsequent walkthrough, Lonneker pointed out Binschus ripped down the shower rod and punched the mirror. 2RP 170. The bedroom door was

bowed and would not shut all the way. 2RP 172. The bathroom lock and doorjamb plate were loose. 2RP 173-74.

Binschus and Bates emerged from the apartment shortly after Officer Fountain arrived. 2RP 156, 158-59. Bates took off. 2RP 160. Binschus was detained without incident. 2RP 159, 182-83.

When asked what happened, Binschus said his sister was in the hospital, he was upset, and that they would not let him into the apartment. 2RP 175. He admitted he went through the window. 2RP 189. When asked why he went through the window, Binschus said he was high on crack. 2RP 175. He was physically agitated and kept rocking back and forth, saying his sister was in the hospital. 2RP 175. He sang to himself once in a while. 2RP 175.

C. ARGUMENT

1. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST LESSER OFFENSE INSTRUCTION ON FIRST DEGREE TRESPASS.

Defense counsel was ineffective in failing to request instruction for first degree trespass as a lesser included offense of residential burglary. No legitimate strategy justified the failure, which undermines confidence in the outcome.

a. Binschus Was Entitled To A Trespass Instruction As Lesser Included Offense Residential Burglary.

Defendants are entitled to have juries instructed not only on the charged offense, but also on all lesser included offenses. RCW 10.61.006. A defendant is entitled to a lesser offense instruction if (1) each of the elements of the lesser offense is a necessary element of the charged offense and (2) the evidence supports an inference that the defendant committed the lesser offense. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The test is satisfied here.

As a matter of law, all the elements of first-degree trespass are included in residential burglary. State v. J.P., 130 Wn. App. 887, 895, 125 P.3d 215 (2005) (citing State v. Soto, 45 Wn. App. 839, 41, 727 P.2d 999 (1986)). A person is guilty of residential burglary when the person enters or remains unlawfully in a dwelling with intent to commit a crime against a person or property therein. RCW 9A.52.025(1). A person is guilty of first degree trespass when "knowingly enters or remains unlawfully in a building." RCW 9A.52.070(1). Residential burglary is simply a criminal trespass with the added element of intent to commit a crime against a person or property therein. J.P., 130 Wn. App. at 895. The legal prong of the Workman test is satisfied.

The factual prong of the Workman test is satisfied when evidence raises an inference that the lesser included offense was committed to the exclusion of the charged offense. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). In other words, if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater, a lesser offense instruction should be given. State v. Berlin, 133 Wn.2d 541, 551, 947 P.2d 700 (1997). In making this determination, the appellate court must view the supporting evidence in the light most favorable to the party seeking the instruction and must consider all evidence presented at trial, regardless of its source. Fernandez-Medina, 141 Wn.2d at 455-56.

The factual prong is satisfied in this case because the evidence, viewed in the light most favorable to Binschus, allowed for the inference that Binschus only committed first degree trespass. Binschus broke the window and then entered the apartment after earlier being asked to leave. 2RP 131. That, by itself, is first-degree trespass. According to Rhonda, Binschus immediately left the apartment after breaking through the window. 2RP 144, 147. That affirmative evidence allows for the inference that Binschus knowingly entered unlawfully but did not intend to commit a crime against anyone or any property inside.

Lonneker, meanwhile, testified Binschus at no time threatened anyone inside the apartment. 2RP 90, 98-99. While his testimony was at times difficult to follow regarding the sequence of events, his testimony showed Binschus damaged property after being invited inside but before being asked to leave and before he went through the broken window. 2RP 67-68, 87-97, 105-07. Lonneker testified Binschus accidentally broke through the window and was only knocking because he was upset about his hospitalized sister. 2RP 65, 72, 95, 96, 113. Binschus would not leave upon request. 2RP 87. From this evidence, a rational trier of fact could infer Binschus did not intend to commit a crime against person or property after unlawfully entering Lonneker's residence.

The affirmative evidence, viewed in the light most favorable to Binschus, allowed for the inference that he only committed first degree trespass. The trial court was required to give this lesser instruction had defense counsel requested it.

b. Defense Counsel's Unreasonable Decision Not To Request The Lesser Offense Instruction Undermines Confidence In The Outcome.

Every criminal defendant is constitutionally guaranteed the right to the effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743

P.2d 816 (1987). The constitutional right to effective assistance "exists, and is needed, in order to protect the fundamental right to a fair trial." Strickland, 466 U.S. at 684.

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Defense counsel is ineffective where (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. Thomas, 109 Wn.2d at 225-26. Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Id. at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Deficient performance is that which falls below an objective standard of reasonableness. Id. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

"[T]he determination of whether an all or nothing strategy is objectively unreasonable is a highly fact specific inquiry." State v. Hassan,

151 Wn. App. 209, 218-20, 211 P.3d 441 (2009). Three factors are used to assess whether a tactical decision not to request a lesser included offense instruction is legitimate: (1) the difference in maximum penalties between the greater and lesser offenses; (2) whether the defense theory of the case is the same for both the greater and lesser offenses; and (3) the overall risk to the defendant, given the totality of the developments at trial. State v. Pittman, 134 Wn. App. 376, 387-88, 166 P.3d 720 (2006); State v. Ward, 125 Wn. App. 243, 246, 249-51, 104 P.3d 670 (2004).

Binschus's case compares favorably to others where counsel was ineffective in failing to request instructions on a lesser offense. In Pittman, this Court held counsel was ineffective for failing to request a lesser included offense instruction on first degree attempted criminal trespass where the defendant was convicted of attempted residential burglary. Pittman, 134 Wn. App. at 379, 390. Pittman's defense was that he never intended to commit a crime once he was inside the victim's home. Id. at 388. This was a risky defense because he clearly committed a crime similar to the one charged but the jury had no option other than to convict or acquit. Id. at 388. Moreover the penalties for the lesser and greater offenses varied significantly (9 to 10 1/2 months for attempted residential burglary versus maximum of 90 days for attempted first degree trespass). Id. at 388-89.

In Ward, this Court held counsel was ineffective for failing to request a lesser included instruction on unlawful display of weapon where the defendant was convicted of second degree assault. Ward, 125 Wn. App. at 246. The failure was not a legitimate trial strategy because there was a significant difference in penalties between the lesser and greater offenses, Ward's defense was the same for both the lesser and greater offenses, and there was an inherent risk in relying solely on Ward's claim of self-defense because of credibility problems. Id. at 249-50.

As in Pittman and Ward, there is a stark difference in penalties between the charged crime and the lesser offense in Binschus's case. Based on Binschus's offender score of "8," residential burglary carries a maximum standard range sentence of 70 months confinement, whereas trespass is merely a gross misdemeanor that carries a maximum one year term of confinement. RCW 9A.52.070(2) (first degree trespass is gross misdemeanor); RCW 9A.20.021(2) (one year maximum for gross misdemeanor); RCW 9A.52.025(2) (residential burglary is class b felony); RCW 9.94A.510 (sentencing grid); RCW 9.94A.515 (seriousness level); RCW 9.94A.525 (offender score calculations).

As in Pittman and Ward, the defense theory of the case is the same for both the greater and lesser offenses. The defense theory was that Binschus did not intend to commit a crime against person or property after

entering the window and that he did not in fact do so. 2RP 225-29. Defense counsel would not have compromised his defense theory by requesting trespass instructions.

Finally, as in Pittman and Ward, the defense in Binschus's case was unreasonably risky. Binschus clearly committed a crime similar to the one charged but the jury had no option other than to convict or acquit. Pittman, 134 Wn. App. at 388.

The lesser offense rule "affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal." Beck v. Alabama, 447 U.S. 625, 633, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." Pittman, 134 Wn. App. at 388 (quoting Keeble v. United States, 412 U.S. 205, 250, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973)). This result is avoided when the jury is given the option of finding a defendant guilty of a lesser included offense, thereby giving "the defendant the full benefit of the reasonable-doubt standard." Beck, 447 U.S. at 633.

Defense counsel argued the State failed to prove Binschus committed residential burglary on the theory that Binschus did not intend to commit a crime against person or property after entering the window.

2RP 225-29. The testimony of Lonneker and Rhonda Binschus supported an inference that Binschus did not intend to commit a crime once inside because he did not in fact damage anything or threaten anyone after entering the window without permission. Officer Fountain's testimony, in relating what Lonneker told her and dispatch, conflicted with this version of events.

The undisputed testimony showed Binschus engaged in conduct that amounted to first-degree trespass. Binschus himself admitted to Officer Fountain that he went through the window after not being allowed inside. 2RP 175, 189.

One of the elements of the offense charged was called into question — his intent to commit a crime inside Lonneker's home — but he was plainly guilty of a similar offense. Pittman, 134 Wn. App. at 388. Instruction 9, meanwhile, allowed the jury to infer Binschus intended to commit a crime inside the apartment based on the mere fact that he entered or remained unlawfully. CP 35. Instruction 9 gave the jury a tempting offer that would have been especially difficult to resist in the absence of an option to convict on a lesser offense.

Counsel's decision to pursue an all or nothing strategy must be measured against the likelihood that the jury, faced with evidence that Binschus committed some crime, was likely to resolve doubts in favor of

conviction rather than acquittal. Binschus clearly committed the crime of first-degree trespass. There was no dispute he broke the window and then entered the apartment after previously being told to leave. The all or nothing strategy was unreasonably risky because there was overwhelming evidence that Binschus was guilty of an offense similar to the one charged. State v. Grier, 150 Wn. App. 619, 643, 208 P.3d 1221 (2009), review granted, 167 Wn.2d 1017, 224 P.3d 773 (2010); State v. Smith, 154 Wn. App. 272, 278-79, 223 P.3d 1262 (2009); State v. Breitung, 155 Wn. App. 606, 230 P.3d 614, 619-20 (2010). No legitimate strategy justified counsel's failure to give his client "the full benefit of the reasonable-doubt standard." Beck, 447 U.S. at 633.

Counsel's deficiency prejudiced Binschus. Reversal is required when a defendant is entitled to instruction on a lesser charge but does not receive it. See State v. Parker, 102 Wn.2d 161, 163-64, 166, 683 P.2d 189 (1984) (where defendant has right to lesser offense instruction, appellate court barred from holding defendant not prejudiced by failure to submit instruction to jury). Moreover, there is a reasonable probability that the jury may have chosen to convict for trespass had it been given the choice because the undisputed evidence allowed for lesser conviction while evidence related to the burglary charge was in conflict. Without instruction on the lesser degree, the jury may have voted to convict of

residential burglary only because outright acquittal was the only alternative.

This undermines confidence in the outcome of the trial.

D. CONCLUSION

For the reasons stated, this Court should reverse Binschus's residential burglary conviction and remand for a new trial.

DATED this 29th day of June 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	COA NO. 64454-8-I
)	
FRED BINSCHUS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF JUNE, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ERIC RICHEY
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SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF JUNE, 2010.

X *Patrick Mayovsky*