NO. 44301-5

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RYAN MICHAEL WEIGANT,

Appellant.

BRIEF OF APPELLANT

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Assignment of Error

1. The defendant's conviction for second degree burglary was not supported by substantial evidence and thus violated his right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

2. Trial counsel's failure to propose WPIC 6.05 instructing the jury to carefully consider the testimony of the accomplice denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. Does substantial evidence support a burglary when the evidence seen in the light most favorable to the state only supports a conclusion that the defendant was in possession of property taken in a recent burglary?

2. In a case in which the only substantive evidence of the defendant's involvement in a crime came from the testimony of an accomplice, does a defense counsel's failure to propose WPIC 6.05 instructing the jury to carefully consider the testimony of that accomplice deny a defendant effective assistance of counsel in a case in which the jury would more likely than not have acquitted had the court given them the instruction?

STATEMENT OF THE CASE

Factual History

During August of 2012 a Lewis County resident by the name of Tara Watson returned from inpatient treatment for her drug addiction and began again to use methamphetamine on almost a daily basis. RP 59-60, 76-77, 84-85, 122-125.[1] Her drug supplier's name was Benjamin Monk, who many times gave her the methamphetamine she used in return for driving him around as he bought and sold drugs since she had a car and he did not. RP 122-125, 126. Around mid-August, Benjamin Monk introduced Tara Watson to the defendant Ryan Weigant, who had been one of Mr. Monk's friends while growing up. RP 58, 73. After a short period of time Ms Watson started a sexual relationship with the defendant. RP 80-81.

According to Tara Watson, on two or three occasions at the end of August, she drove Mr. Monk and the defendant to the end of Fish Hatchery Road outside MossyRock so they could go fishing at a public access area. RP 61-62. In fact, Mr Monk had routinely fished from this location while growing up. RP 116-118. On each of these occasions they arrived around dark and according to Tara, on each occasion Mr. Monk and the defendant left their fishing poles in the water and took a walk together at one point on

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[1]The record on appeal includes three volumes of consecutively numbered verbatim reports referred to herein as "RP [page #]."

each evening. RP 62-65. Ms Watson later told the police that on the second occasion Mr. Monk and the defendant returned with an ATV and a moped. *Id.* One of them put the moped in the trunk, and then the defendant drove the car while pulling Mr. Monk on the ATV to a location where they "stashed" the ATV. RP 65-66. Ms Watson admitted that she knew that both of the items were stolen. RP 65-66, 100.

Mr. Monk's version of what had happened varied significantly from that of Ms Watson. RP 116-139. Although he admitted having Ms Watson drive him out to the end of Fish Hatchery Road a couple of times during the end of August so he could go fishing, he denied that the defendant had ever been present. RP 116-118. Rather, he stated that on each occasion he and Ms Watson had been alone, and that on the second occasion both of them had entered a garage at the nearby fish hatchery where they stole an ATV. RP 116-122. He got the moped from an adjacent residence. *Id.* In fact, Mr. Monk later testified that Ms Watson held the garage door up while he pushed the ATV out and that Ms Watson had driven her car and towed the ATV to a location where they stashed it. *Id.* He also testified that he later sold the ATV for $650.00 and split the money with Ms Watson deducting a sum to pay off a drug debt she owed him. RP 137.

By the first week of September Ms Watson's relationship with the defendant began to sour. RP 102. They ended up having an argument when

he got mad because she refused to take him to a recycling center so he could get money for some copper wire she had put in her trunk and she got mad because he failed to put gas in her car as he had promised. RP 102-104. He ended up walking away from her car with her cell phone with her telling him that if he didn't give her back the phone he would be sorry. *Id.* A couple of days later she called crime stoppers to report the theft of the ATV and later met with the police, told them that both the defendant and Mr. Monk had been involved in the theft, and that she believed the wire and other items the defendant had put in her trunk were stolen. *Id.*

Procedural History

By information filed September 19, 2012, the Lewis County Prosecutor charged the defendant Ryan Weigant with one count of second degree burglary. CP 1-3. The prosecutor later amended the information to add charges of trafficking in stolen property and taking a motor vehicle without permission but later dropped the trafficking claim. CP 8-10, 31-33. The case eventually came to trial with the state calling five witnesses, including Tara Watson and Benjamin Monk. RP 27, 42, 56, 116, 139, 189, 195. These witnesses testified to the facts contained in the preceding factual history. *See* Factual History. During the testimony of the investigating officer he admitted that he had no physical evidence connecting the defendant to the burglary at the fish hatchery. RP 184. However, the officer

did claim that Benjamin Monk had previously stated that the defendant was present and did participate in the crime. RP 185-186.

Following the close of the state's case the defense called one witness who claimed that the defendant was with her during the time of the burglary. RP 202-218. The court then instructed the jury without objection from the defense. RP 223. The defense did not ask the court to give the jury WPIC 6.05 on evaluating the testimony of the accomplice. RP 219-225; CP 1-87. Following a number of hours of deliberation the jury returned verdicts of guilty on the burglary and the taking a motor vehicle charges. CP 56-57. The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 64-73, 76-86.

ARGUMENT

I. THE DEFENDANT'S CONVICTION FOR SECOND DEGREE BURGLARY WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND THUS VIOLATED HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id. In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

"Substantial evidence" in the context of a criminal case means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether "after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

For example, in *State. v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982), the defendant was charged and convicted of burglary. At trial, the state presented the following evidence: (1) during the evening in question, someone entered the victims' home in Richland without permission and took a purse, which contained a wallet and a bank access card, (2) that the card was used in a cash machine in Kennewick (an adjoining city), at 4:30 that same morning, (3) that the victim's wallet was found in a bag next to the cash machine, (4) that the bag had the defendant's fingerprints on it, and (5) that the defendant's fingerprints were also found on a piece of paper located by a second cash machine where the card was used.

Following conviction, the defendant appealed, arguing that the state had failed to present substantial evidence to support the burglary conviction.

The Court of Appeals disagreed, and affirmed. The defendant then sought and obtained review by the Washington Supreme Court, which reversed, stating as follows.

> Second degree burglary is defined as follows:
>
> > A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle.
> >
> > RCW 9A.52.030(1). We agree with petitioner that the State failed to sustain its burden of proof. The State's evidence proved only that petitioner may have possessed the recently stolen bank cards in Kennewick. ***There was no direct evidence, only inferences***, that he had committed second degree burglary by entering the premises in Richland.

State v. Mace, 97 Wn.2d at 842 (emphasis added).

In the case at bar the state also charged the defendant with burglary as did the state in *Mace*. Seen in the light most favorable to the state the only substantive evidence presented at trial implicating the defendant came from the testimony of Tara Watson who stated that while at the end of Fish Hatchery Road Benjamin Monk and the defendant took a walk and later returned with a moped and the ATV. She did not claim that the defendant admitted entering the garage or that he had anything to do with the burglary. At most he was an accomplice to Benjamin Monk's possession of the ATV. While it is possible that he and Benjamin Monk entered the garage together and stole the ATV, it is equally as possible that Benjamin stole the vehicle

himself and the defendant only became aware of his actions after the fact. In essence, this case is like the fact from *Mace*. To use the language from *Mace*, in this case "[t]here was no direct evidence, only inferences, that [the defendant] had committed second degree burglary." Thus, in the same manner that the evidence in *Mace* was insufficient to support a burglary conviction, so in the case at bar the evidence was insufficient to support a conviction for burglary. As a result, this court should vacate the defendant's burglary conviction and remand with instructions to dismiss that charge.

II. TRIAL COUNSEL'S FAILURE TO PROPOSE WPIC 6.05 INSTRUCTING THE JURY TO CAREFULLY CONSIDER THE TESTIMONY OF AN ACCOMPLICE DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's professional errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v.*

Kinchelse, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068)). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to propose WPIC 6.05. This instruction states:

> Testimony of an accomplice, given on behalf of the *[State][City][County]*, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

WPIC 6.05.

The Washington Supreme Court Committee on Jury Instructions suggests that the trial court should give this instruction "if requested by the defense, in every case in which the State relies upon the testimony of an accomplice." *See* Note on Use, WPIC 6.05. The Committee goes on to state that the court should not use this instruction "if an accomplice or codefendant testifies for the defendant." *Id.* The usefulness to the defense of convincing the court to use this instruction flows from the fact that it is, in essence, a negative comment on the credibility of a state's witness. Indeed, by its very

language it instructs the jury to use "great caution" when evaluating the evidence of an accomplice. There is no negative consequence to the defense from proposing it and convincing the court to use it. Consequently, no reasonable defense attorney would fail to propose this instruction if the facts of a case allowed for such a proposal.

In the case at bar, the facts of the case did allow for the proposal and use of WPIC 6.05. As is apparent from Tara Watson's testimony, she admittedly acted in concert with Benjamin Monk and the defendant when they returned with the ATV. She let them drive her vehicle with her in it to hide the stolen property. In addition, while she attempted to minimize her part in the crime, Benjamin Monk testified that she drove him out to the location for the very purpose of stealing the ATV and that she received money from its sale after the fact. Consequently, since the prosecutor called Tara Watson as a witness for the state, WPIC 6.05 was available for use and there was no tactical reason for the defendant's trial attorney to fail to propose it. This failure fell below the standard of a reasonably prudent attorney

In addition, the failure to propose the use of WPIC 6.05 also caused prejudice to the defendant because (1) there was no other evidence connecting the defendant with the crime in question, and (2) Tara Watson's continued and admitted drug use, coupled with her inability to recall things

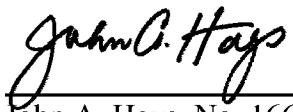
that happened during that period of time called the accuracy of her claims into doubt. Had the court given WPIC 6.05 to instruct the jury to view Tara Watson's testimony with "great caution," it is more likely than not that the jury would have acquitted the defendant on both charges. Thus, trial counsel's failure to propose the use of this instruction denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As a result, he is entitled to a new trial.

CONCLUSION

Substantial evidence does not support the defendant's conviction for second degree burglary. As a result this court should vacate that conviction and remand with instructions to dismiss. In addition trial counsel's failure to propose the use of WPIC 6.05 on the Testimony of an Accomplice denied the defendant effective assistance of counsel. As a result, this court should vacate the defendant's conviction for taking a motor vehicle and remand for a new trial.

DATED this 1st day of July, 2013.

Respectfully submitted,



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APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

WASHINGTON CONSTITUTION
ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION,
SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

WPIC 6.05
Testimony of Accomplice

Testimony of an accomplice, given on behalf of the [State][City][County], should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. RYAN MICHAEL WEIGANT, Appellant.	NO. 44301-5-II AFFIRMATION OF OF SERVICE

Cathy Russell states the following under penalty of perjury under the laws of Washington State. On July 1st, 2013, I personally e-filed and/or placed in the United States Mail the following document with postage paid to the indicated parties:

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Dated this 1st day of July, 2013, at Longview, Washington.

/s/

Cathy Russell, Legal Assistant

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