

No. 44301-5-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RYAN MICHAEL WEIGANT,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Did the State not present sufficient evidence to prove beyond a reasonable doubt that Weigant committed Burglary in the Second Degree?
- B. Was Weigant's trial counsel ineffective for failing to propose WPIC 6.05?

II. STATEMENT OF THE CASE

Tara Watson began to hang out with Benjamin Monk the summer of 2012. RP 57-58. Ms. Watson would give Mr. Monk rides in her Honda Civic or Accord¹ in exchange for him supplying her with methamphetamine. RP 124. Ms. Watson was separated from her husband and dealing with a methamphetamine problem during the summer of 2012. RP 57-58. Weigant and Mr. Monk grew up together in Mossyrock and have known each other for a long time. RP 116. Ms. Watson would go for rides in her car with Weigant and Mr. Monk and the three of them would use methamphetamine together. RP 60-61.

Around August 30, 2013 Ms. Watson went to the fish hatchery in Mossyrock with Mr. Monk and Weigant. RP 61-62. According to Ms. Watson they went to the fish hatchery at least two times, both in the evening hours. RP 61-62. Weigant and Mr. Monk would take their fishing poles down to the public access area to go

¹ Ms. Watson could not remember if her Honda was a Civic or Accord. RP 59.

fishing. RP 62-63. Mr. Monk and Weigant made a fire both nights they were out at the fish hatchery. RP 63-64. The second night Ms. Watson, Mr. Monk and Weigant were at the fish hatchery, Weigant and Mr. Monk went for a walk. RP 64. Ms. Watson got tired while waiting for the men to return so she laid down in the passenger seat of her car to take a nap. RP 64.

Ms. Watson was awakened from her nap by the return of Mr. Monk and Weigant. RP 64. The men had a moped and a quad with them. RP 64-65. The moped was placed in the trunk of Ms. Watson's car. RP 64. The quad was somehow tied to Ms. Watson's car and Weigant drove the car, towing the quad, while Mr. Monk rode on the quad, steering it. RP 66. Ms. Watson asked if the quad was stolen and was told it was not but she became suspicious because there was no key for the quad. RP 65-66. The quad and moped were driven down a gravel road and stashed by Mr. Monk and Weigant. RP 66-67.

Tim Summers, a Department of Fish and Wildlife employee, who works at the fish hatchery reported a burglary at the fish hatchery. RP 42-44. Mr. Summers was called to the fish hatchery by another employee around 8:45 a.m. on August 31, 2012 and found that the hatchery's quad was missing. RP 44. The quad had

been secured to a non-working forklift by a cable. RP 45. The cable had been cut and the quad had been taken without permission. RP 44-45. The quad was in operating condition. RP 47. Mr. Summers also noticed that a chainsaw and a moped had been taken. RP 53-54.

Ms. Watson did not immediately come forward about the burglary and theft of the quad. RP 114-15. Ms. Watson did eventually call Crime Stoppers to anonymously report the burglary and theft of the quad. RP 68. Ms. Watson initially made the report anonymously because she did not want to air her dirty laundry all over town that she was using methamphetamine. RP 68. Eventually Ms. Watson contacted the Lewis County Sheriff's Office and Detective Adkisson got in touch with Ms. Watson about the burglary. RP 68, 142. Ms. Watson was able to take Detective Adkisson to the place where Mr. Monk and Weigant stashed the quad and the moped. RP 69, 164. The moped was still there but the quad had been removed. RP 69, 167.

Mr. Monk was picked up and Detective Adkisson spoke to him about the burglary at the fish hatchery. RP 169. Mr. Monk admitted to the burglary and told Detective Adkisson that Weigant committed the burglary with him. RP 169. Mr. Monk could describe

what had happened and the different steps they went through to steal the quad, which matched the statements Ms. Watson had given Detective Adkisson. RP 174, 186. Detective Adkisson spoke to Mr. Monk a second time at the request of the prosecutor's office because there was information that Mr. Monk was planning on testifying that he did the burglary himself, without Weigant's assistance. RP 171. Mr. Monk told Detective Adkisson that "he was going to take the rap for the burglary because it was the truth." RP 172.

Weigant was charged and went to trial on one count of Burglary in the Second Degree and one count of Taking a Motor Vehicle Without Permission in the Second Degree. CP 31-33. The State alleged that on or about and between August 30, 2012 and August 31, 2012 Weigant entered or remained unlawfully in the fish hatchery building with the intent to commit a crime against person or property therein and that Weigant took the Honda quad without permission. CP 31-32. Weigant elected to have his case tried to a jury. RP 1

At trial Mr. Monk did appear and testify that the burglary was committed by him and Ms. Watson and Weigant was not involved. RP 118-19. Mr. Monk denied telling Detective Adkisson that he and

Weigant had committed the burglary. RP 120-21. Sandra Cook, who considers herself Weigant's step-mother, testified on Weigant's behalf. RP 202. Ms. Cook claimed that Weigant was staying with her during the last two weeks or so of August 2012. RP 202-03. Ms. Cook also stated the weekend of August 30, 2012 Weigant was helping her out and was home all night on the 30th. RP 206-08.

Weigant was convicted as charged. 56-57. Weigant was sentenced to 68 months in prison for the Burglary in the Second Degree conviction and 22 months in prison for the Taking a Motor Vehicle Without Permission in the Second Degree conviction, to run concurrent. CP 67. Weigant timely appeals his conviction. CP 76-86.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE STATE PRESENTED SUFFICIENT EVIDENCE TO PROVE WEIGANT COMMITTED BURGLARY IN THE SECOND DEGREE.

The State presented sufficient evidence to sustain the trial court's conviction for Burglary in the Second Degree. The evidence

introduced proved that Weigant, at a minimum, was an accomplice to the burglary of the fish hatchery building and theft of the quad.

1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. There Was Sufficient Evidence Presented To Prove Weigant Committed The Crime Of Burglary In The Second Degree, Either As A Primary Participant Or An Accomplice.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as

reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

Weigant makes the following argument, citing to *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996)²: "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."

² Weigant cites to *Aten* but fails to provide a pinpoint cite. "To point your reader to the specific page(s) that relate to the cited proposition, you must also include a **pinpoint citation**, often called a "**pincite**." Pincites are placed after the page on which the case report begins, separated by a comma and one space. *Pincites are critical*: they provide the only means by which you can direct the reader to the exact page that contains the information or quotation on which you are relying for support." *The Bluebook: A Uniform System of Citation*, Nineteenth Edition (2010), pg. 9. (Bold in original, italics added).

Brief of Appellant 6. *Aten* is a *corpus delicti* case and the previous statement about innocence and guilt is part of the standard test for determining if there is independent evidence sufficient under the *corpus delicti* rule. See *State v. Brockob*, 159 Wn.2d 311, 329, 150 P.3d 59 (2006). At best, Weigant's citation to the authority in *Aten* is persuasive rather than binding and Weigant should have argued it as such.

Weigant also argues as binding authority the following:

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.

Brief of Appellant 6.³ Second, after a thorough reading of *Moore*, the issues assigned error in that case relate to allegedly improper admission of evidence. See *Moore*, 7 Wn. App. at 3-9. The State could not find any language in *Moore* that supports the authority Weigant attributes to *Moore* in his briefing. Weigant's actions regarding his citations to *Moore* are improper and this Court should take note of it.

³ Again, Weigant fails to provide a pinpoint citation.

To convict Weigant of Burglary in the Second Degree the State was required to prove, beyond a reasonable doubt, that Weigant, with intent to commit a crime against a person or property therein, entered or remained unlawfully in a building, other than a vehicle or a dwelling. RCW 9A.52.030; CP 31, 41, 45. Weigant can be found guilty as a principle or as an accomplice. CP 31, 41, 51. A person who aids, or agrees to aid, another person in committing a crime, with knowledge that it will promote or facilitate the commission of the crime, is an accomplice to the commission of the crime. CP 51.

Weigant argues that the State presented insufficient evidence to support the Burglary in the Second Degree conviction, and at best, the State proved Weigant was an accomplice to Mr. Monk's possession of the stolen quad. Brief of Appellant 8. Weigant further argues that while it is possible that Weigant and Mr. Monk entered the garage together to steal the quad, it is equally possible that Mr. Monk stole the quad by himself and Weigant was made aware of the theft after the fact. Brief of Appellant 8-9. Weigant's assertions are incorrect. The State presented sufficient evidence that Weigant was, at a minimum, an accomplice to the burglary of the fish hatchery.

Ms. Watson testified that Weigant and Mr. Monk went for a walk by the fish hatchery when the three of them were out at the public access area one night around August 30, 2012. RP 61-64. Mr. Monk testified that he went out to the fish hatchery around August 30, 2012 and August 31, 2012. RP 118. Mr. Monk admitted to stealing the quad from inside of a building at the fish hatchery. RP 117. Ms. Watson testified that she was awakened by Mr. Monk and Weigant's return and the men had a moped and a quad with them. RP 64-65. Ms. Watson asked if the quad was stolen and Mr. Monk and Weigant told her it was not, that it belonged to Weigant and they were just picking up his stuff. RP 65. The men did not have the key to the quad and Ms. Watson figured it was stolen. RP 66. According to Ms. Watson, Weigant drove her car while Mr. Monk rode on the quad, steering it, as Weigant towed the quad away from the fish hatchery. RP 66. The quad and moped were stashed out a gravel road, down by a gate. RP 66-67.

The first time Mr. Monk spoke to Detective Adkisson he admitted he had committed the burglary with Weigant. RP 169. Detective Adkisson spoke to Mr. Monk for approximately one half of an hour to 45 minutes. RP 188-89. During that time Mr. Monk was able to give specific details of the burglary and described the series

of events surrounding the burglary which matched the statements Detective Adkisson had taken from Ms. Watson. RP 174, 186. Mr. Monk did not identify any other person as being involved in the burglary besides himself and Weigant. RP 173, 186. Detective Adkisson did believe that Mr. Monk was, at least in part, attempting to protect Ms. Watson by not naming her. RP 174.

Detective Adkisson did speak to Mr. Monk a second time for approximately five minutes. RP 188-89. During that brief conversation Mr. Monk told Detective Adkisson that he alone committed the burglary. RP 172. Mr. Monk told Detective Adkisson that Weigant was not present but that Weigant did know about the burglary. RP 175.

During his testimony at trial, Mr. Monk denied telling Detective Adkisson that Weigant had committed the burglary with him. RP 119-21. Mr. Monk testified that Weigant was not present and it was Mr. Monk and Ms. Watson who committed the burglary at the fish hatchery. RP 119, 131. Mr. Monk did testify that Ms. Watson had to hold the door, because it was a rolling door and he could not hold the door open by himself and remove the quad from the building. RP 132. Mr. Summers testified that the garage doors were heavy, with a worn spring, so if a person does not open them

all the way up, the garage doors will slam closed. RP 196-97. Ms. Watson could not describe the building that the quad had been stolen from. RP 178.

Weigant argues his case is similar to *State v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982). In *Mace* the Swift's house was burglarized and Mrs. Swift's purse was stolen. *Mace*, 97 Wn.2d at 841-42. Mrs. Swift's bank card was used twice the morning of the burglary. *Id.* at 842. Mrs. Swift's wallet was found inside a McDonald's sack and the bag had a finger print on it that was identified as belonging to Mace. *Id.* Someone attempted to use Mrs. Swift's bank card later that same day but was unsuccessful. *Id.* A search of the garbage next to the cash machine yielded a receipt, with a number not identified during the trial, with Mace's fingerprint on it. *Id.* The Supreme Court held that Mace's Burglary in the Second Degree conviction could not stand because there was insufficient evidence that Mace was the person who committed the burglary. *Id.* at 842-43. The Supreme Court stated that the evidence only proved Mace was in possession of the stolen bank cards. *Id.* at 842-43. The Supreme Court noted there were merely inferences that Mace committed the burglary. *Id.* at 843.

The evidence submitted to the jury during Weigant's trial supported more than an inference that Weigant participated in the burglary. This case came down to a credibility determination. There was no denying that the quad had been stolen from the fish hatchery and that Mr. Monk was a participant in that burglary. The jury had to determine who was telling the truth, Mr. Monk as he presented his testimony at trial or Ms. Watson and Detective Adkisson. The jury also had to determine how credible Ms. Cook's testimony was. Determinations in credibility are solely within the scope of the jury and the reviewing court does not substitute its judgment for the jury's. *Myers*, 133 Wn.2d at 38; *Green*, 94 Wn.2d at 221.

Mr. Monk could not have committed the burglary by himself as asserted by Weigant in his briefing. Brief of Appellant at 8-9. Mr. Monk had to have an accomplice to, at a minimum, aid by holding the garage door open so Mr. Monk could remove the quad from the building. RP 132, 196-97; See CP 51. Mr. Monk's original version of events, as told by him to Detective Adkisson, was consistent with the statements made by Ms. Watson. RP 174, 186. Finally, Ms. Cook's alibi testimony was shaky at best, and likely seen by the jury for what it was, a step-mother's attempt to protect her step-son. RP

202-214. Therefore, when this Court views the evidence in the light most favorable to the State, any rational jury could find beyond a reasonable doubt that Weigant was, at a minimum, an accomplice to the burglary at the fish hatchery. This Court should affirm Weigant's conviction for Burglary in the Second Degree.

B. WEIGANT RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.

Weigant's attorney provided competent and effective legal counsel throughout the course of his representation. Weigant asserts his attorney was ineffective for failing to propose WPIC 6.05, the instruction cautioning the jury about the testimony of an accomplice. Brief of Appellant 11. Weigant argues he was prejudiced by his attorney's failure to request the instruction because the only testimony regarding his participation in the burglary came from Ms. Watson, an accomplice. Brief of Appellant at 12.

Weigant's assertion that his attorney was ineffective is false. If this Court were to find Weigant's attorney's performance was deficient, Weigant cannot show he was prejudiced by his attorney's conduct and his ineffective assistance claim therefore fails.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. Weigant's Attorney Was Not Ineffective During His Representation Of Weigant Throughout The Jury Trial.

To prevail on an ineffective assistance of counsel claim Weigant must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not

deficient “where there is no conceivable legitimate tactic explaining counsel's performance.” *Reichenbach*, 153 Wn.2d at 130.

If counsel’s performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice “requires ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *State v. Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694.

In a trial setting, if an attorney’s conduct can be characterized as legitimate tactics or trial strategy the attorney’s performance is not deficient. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If an attorney’s actions are trial tactics or the theory of the case the reviewing court will not find ineffective assistance of counsel. *Grier*, 171 Wn.2d at 33.

WPIC 6.05 in the jury instruction regarding the testimony of an accomplice. It 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 Note on Use section states, "Use this instruction, if requested by the defense, in every case in which the State relies upon the testimony of an accomplice. Do not use this instruction if an accomplice or codefendant testifies for the defendant." WPIC 6.05, Note on Use.

Weigant's attorney did not request WPIC 6.05. RP 223. The State did call two witnesses, both who would fit under the category of accomplice, Ms. Watson and Mr. Monk. RP 56, 116. What differentiates this case from most accomplice liability cases where the evidence is somewhat uncorroborated is one accomplice, Ms. Watson, testified that Weigant participated in the burglary, and the second accomplice, Mr. Monk, testified Weigant was not involved and takes the blame for the burglary. RP 64-67, 117-21. While Mr. Monk was technically the State's witness, he testified for Weigant. Mr. Monk took the blame, placed Ms. Watson at the scene of the burglary with Mr. Monk, and denied Weigant was present. RP 117-21, 131-32.

In this case it was a tactical decision to not propose WPIC 6.05 because Weigant's attorney did not want limitations placed upon Mr. Monk's testimony. Mr. Monk's testimony was potentially good for Weigant and his attorney did not want to undermine

anything Mr. Monk told the jury by adding a cautionary instruction regarding an accomplice's testimony.

Weigant received effective assistance from his attorney and his conviction should be affirmed.

3. If Weigant's Attorney Is Found To Be Deficient, Weigant Has Not Met His Burden To Show That He Was Prejudiced By The Deficient Performance Of His Attorney.

The State maintains that Weigant's attorney's performance was not deficient, *arguendo*, if this Court were to find Weigant's attorney's performance deficient; Weigant has not met his burden to show he was prejudiced. Weigant must show that, but for his attorney's error for failing to request WPIC 6.05, regarding the testimony of an accomplice, the jury would not have found Weigant not guilty. *See Horton*, 116 Wn. App. at 921-22. Weigant argues he was prejudiced because there was no other evidence connecting him to the crime beyond Ms. Watson's testimony and Ms. Watson's continued drug use and inability to recall details called the accuracy of Ms. Watson's testimony into doubt. Brief of Appellant 12-13.

Even if the trial court gave WPIC 6.05, cautioning the jury to carefully examine Ms. Watson's testimony and act upon it with great caution, the jury still would have found Weigant guilty of burglary in the second degree. As argued above, it was not only the

testimony of Ms. Watson, but also the initial statements of Mr. Monk, and Mr. Monk's testimony that he could not have committed the burglary alone that proved Weigant was guilty of Burglary in the Second Degree. Weigant's ineffective assistance of counsel argument fails as he was not prejudiced by his attorney's deficient conduct and this Court should affirm the conviction.

IV. CONCLUSION

For the foregoing reasons, this court should affirm Weigant's conviction.

RESPECTFULLY submitted this 9th day of September, 2013.

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