

NO. 66078-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION I

JACOB LIN,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

2011 SEP 13 PM 4:14
COURT OF APPEALS
STATE OF WASHINGTON
FILED IN DIVISION I

~~MOTION FOR EXTENSION OF TIME TO FILE ADDITIONAL
GROUNDS FOR APPEAL~~

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

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1. Due to a misunderstanding I wasn't present at the time a stipulation as to my prior convictions was entered into but the records states that it includes the Certificate of Probable Cause, which would be improper. It would be ineffective assistance of counsel for my lawyer not to have objected. In the interests of justice it prejudiced me and a new trial should be ordered.

I was already prejudiced due to my inadvertent absence and to include the details of the prior conviction is improper. Tegland, Courtroom Handbook on Washington Evidence, (2009-2010 Edition) at p. 332 states, "Questions about a defendant's previous conviction are normally limited to asking about the facts of the conviction, the type of crime leading to the conviction, and the punishment imposed. Details of the conduct leading to the conviction are unduly prejudicial and usually inadmissible." The Certificate of Probable Cause would add such prejudicial information.

2. These objections were raised at the time of sentencing, Vo. III of the transcriptions on Sept. 3, 2010.

The instructions involving aggravating circumstances and egregious lack of remorse do not sufficiently instruct the jury. The words "aggravating" and "egregious" are modifiers and the instructions do not define either of these words. They are not so obvious that jurors may be expected to know how to apply them. The statute is recent as are the WPICs adopted to instruct the jury so that there is, to my knowledge no case law directly in point. 11A Washington Practice 737 (2008) states, "No case, however, defines what constitutes an egregious lack of remorse."

The instructions involved are Nos. 51, 52 and 53 as well as verdict forms 26A, 27A, 28A and 29A.

The WIPCs and the comments really only define what isn't an egregious lack of remorse rather than giving positive direction to the jury as to what is "egregious" and the court in the instant case gives no definition of "egregious" so that the jury can distinguish between "ordinary" lack of remorse and "egregious". State v. Ross, 71 Wn. App. 556, 861 P2d 473 (1993) stated,

"However, the lack of remorse must be of an aggravated or egregious nature." in holding that an enhancement must show that to be legally applied.

The same argument applies to the undefined use of the word aggravated.

The discussion in the comments to WPIC 300.26 all involve violent crimes, such as a man who discussed feeling more remorse over having killed a dog than a person. Clearly the committee hadn't considered crimes of the nature of embezzlement, forgery and theft in drafting the WPIC. The jury needed instruction as to just what might be considered "egregious".

There was insufficient evidence to distinguish between ordinary remorsefulness and "egregious" remorselessness. It appears that there was no evidence presented which would show that there was any basic difference in Mr. Lin's crime and ordinary crimes of this nature. With regard to his personal feelings (the essence of remorse) this couldn't be fully explored because he was absent due to cultural misunderstanding as to the nature of court proceedings.

State v. Montgomery, 163 Wn.2d 577 (2008) states, "Evidence is sufficient to support a jury's verdict if a rational person viewing the evidence in the light

most favorable to the State could find each element beyond a reasonable doubt."

With a personal feeling related to the individual defendant's attitude, as opposed to something such as deliberate cruelty, is one where it is important that the defendant be observed and questioned regarding these things when there is nothing out of the ordinary as to the method of the crime or the amount taken.

3. Ineffective assistance of counsel for failure to object to Exhibit 75 (Report of Proceedings, Vol. I, p.151) which is alleged to be an apology, therefore an admission of guilt, from Mr. Lin to Ms. Zhang.

Under ER 901 such an exhibit must be authenticated as being what it claims to be. No proper foundation was laid to show that this exhibit was, in fact, an email from Mr. Lin. It is obviously hearsay and there was no testimony showing it to be exempt from the requirements of hearsay for admissibility as opposed to its authentication. Tegland, Courtroom Handbook on Washington Evidence, (2009-2010 Edition), at p. 493, states, "Because emails can be easily altered, some courts and commentators have said that more rigorous requirements should apply to the

authentication of emails and other electronic evidence." In this case there was no authentication at all yet it contains prejudicial material testified to by the witness who makes a bare allegation that it came from Mr. Lin.

4. At pp.155-157 of Vol. I of the Report of Proceedings the State was guilty of misconduct in describing suspected losses as "theft" which amounts to argument characterizing Mr. Lin's actions as the crime of theft, which is argument not a proper form of question. Not to have objected to this makes Mr. Lin the victim of ineffective assistance of counsel. This, in conjunction with the many other instances of ineffective assistance of counsel has deprived Mr. Lin of a fair trial.

Opinion testimony on an ultimate issue in the case is improper, U.S. v. Spaulding, 293 U.S. 498, 507 (1935) as is a personal belief in the guilt of the defendant, State v. Farr-Lenzini, 93 Wn. App. 453, 463, 970 P.2d 313 (1999).

5. Mr. Lin was again the victim of ineffective assistance of counsel for failing to object and require proper foundation, Volume I, p. 156-157, when the victim was asked if accounting records had

been erased in her computer sytem, ER 701. No foundation was laid to show that the absence of data was due to an erasure rather than that the data was never there. The obvious conclusion the State hopes to draw is that Mr. Lin must somehow have "erased" data to avoid detection.

6. Mr. Lin was again the victim of ineffective assistance of counsel for failing to object, Vol. I, p. 168, to an additional ER 701 violation that was also speculative that Ms. Zhang stated, "Uh, just because it's possible he will stolen all money from all different place in our accounts."
7. Mr. Lin was again the victim of ineffective assistance of counsel for the failure to object, Vol. I, p. 194, when Ms. Zhang stated that she opened her credit card statement "...and I found there's how many check wrote to himself." This is another statement of opinion on the ultimate jury decision of whether or not Mr. Lin wrote these checks to himself.

These many instances of my attorney failing to properly represent me have prejudiced me beyond any curative instructions ability to have given me a fair

trial.

Addendum:

In closing, I feel that it is in my best interest not to have a new trial, but for all unsettled or inconsistent issues be validated and corrected. If any issues are unresolved due to discrepancies within the law of the case, then those issues can/may be addressed in a different setting.

I feel that all matters can be resolved within without-a-new-trial.

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Respectful

JACOB C. LIN

Airway Heights Correction C
P. O. Box 2049
Airway Heights, WA 99001