

NO. 34529-3-II

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

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STATE OF WASHINGTON,

Respondent,

v.

B.J.S.

(D.O.B. 11/26/88)

Appellant.

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COURT OF APPEALS  
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STATE OF WASHINGTON  
BY 

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable James E. Warme

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to find appellant guilty of residential burglary under accomplice liability.
2. There was insufficient evidence to find appellant guilty of theft in the second degree under accomplice liability.
3. The trial court erred in entering Findings of Fact 2, 3, 4, 5 and Conclusions of Law 1, 4, 5, 6.<sup>1</sup> Supp CP \_\_ (sub. no. 44, Findings of Fact and Conclusions of Law, 4/18/06).
4. The trial court erred in denying appellant's motion to dismiss.
5. Appellant was denied his constitutional right to effective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Was there insufficient evidence to find appellant guilty of residential burglary and theft in the second degree under accomplice liability because the State failed to prove beyond a reasonable doubt that he aided or agreed to aid another person in planning or committing burglary and theft?

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<sup>1</sup> The trial court's Findings of Fact and Conclusions of Law are attached as Appendix A.

2. Did the trial court err in entering findings of fact unsupported by substantial evidence which consequently failed to support its conclusions of law?

3. Was appellant denied his constitutional right to effective assistance of counsel because defense counsel failed to properly advise him of his eligibility for deferred disposition prior to trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

On November 23, 2005, the Cowlitz County Prosecutor charged appellant, B.J.S., with two counts of Residential Burglary, two counts of Theft in the Second Degree, and one count of Taking a Motor Vehicle Without Permission in the Second Degree. CP 5-7; RCW 9A.52.025, RCW 9A.56.020(1)(a), RCW 9A.56.040(1)(a), RCW 9A.56.040(1)(c); RCW 9A.56.075(1)(2).<sup>2</sup> An adjudicatory hearing was held on February 14, 2006, before the Honorable James E. Warne. 7RP 31.<sup>3</sup> After the State rested, defense counsel moved to dismiss because the State failed to prove the charges beyond a reasonable doubt. 7RP 85-86. The court dismissed the charge of Taking a Motor Vehicle Without Permission in

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<sup>2</sup> On February 13, 2006, the Cowlitz County Prosecutor filed the same information as an "Amended Information Charging." CP 15-18.

<sup>3</sup> There are eight verbatim report of proceedings: 1RP - 11/21/05; 2RP - 11/22/05; 3RP - 11/29/05; 4RP - 12/5/05; 5RP - 12/20/05; 6RP - 01/17/06; 7RP - 02/14/06; 8RP - 02/28/06.

the Second Degree but denied the motion as to the remaining four counts. 7RP 86-87. Thereafter, the court found B.J.S. guilty of one count of Residential Burglary and one count of Theft in the Second Degree for theft of an access device, under accomplice liability. 7RP 126; Supp CP \_\_ (sub. no. 44, supra). On February 28, 2006, the court sentenced B.J.S. to 20 days of confinement and 12 months of community supervision. 8RP 143; Supp CP \_\_ (sub. no. 45, Amended Order on Adjudication and Disposition, 5/9/06). B.J.S. filed this timely appeal. CP 40.

2. Substantive Facts

Deputy Lisa Ulrich testified that on November 18, 2005,<sup>4</sup> she responded to a report of a burglary at 1150 Spirit Lake Highway in Castle Rock. 7RP 44. When Ulrich arrived at the residence, Tim Entler and Dustin Albright, who reported the burglary, were at the house. 7RP 45. Entler told Ulrich that they saw two males “running across the front yard and across the highway.” 7RP 48. Ulrich inspected the home and found “[t]hings were disheveled [sic],” “a couple of alcohol bottles in the kitchen area lying around,” and “[d]ifferent items in the bedroom that were a little disturbed.” 7RP 45.

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<sup>4</sup> It should be noted there are discrepancies on the dates of the incident throughout the proceedings.

Deputy Jennifer Prusa testified that on November 18, 2005, Deputy Ulrich instructed her to contact the owner of the home, Robert Brekke, who was away at the time of the incident. 7RP 61-62. Prusa met with Brekke at his home later that day and he provided a partial list of missing items.<sup>5</sup> 7RP 62.

Timothy Entler testified that on November 19, 2005, he and Dustin Albright went to visit Brekke but his “truck was gone so we didn’t think he was there.” 7RP 75-76. They became suspicious when they noticed that his Chevy was also gone so they called Brekke and found out that he was out of town. Brekke confirmed that he did not know the whereabouts of the Chevy so they called the police. 7RP 76-78. While waiting for authorities to arrive, Entler saw two kids running through the yard but he did not know if one of them was B.J.S., “I can’t say I saw him specifically because I didn’t see his face.” 7RP 78, 81.

Dustin Albright testified that he and Entler went to visit Brekke at his house on November 18, 2005. 7RP 82-83. Two of Brekke’s vehicles were missing and he recognized Jason Norris’s car parked in front of the house. Albright knocked on the door and no one answered so, “I went on

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<sup>5</sup> Brekke took the stand to testify but exercised his Fifth Amendment right to remain silent when asked questions about his relationship with B.J.S. because of pending charges against him for Indecent Liberties allegedly involving B.J.S. 7RP 58-60. The court ruled that because Brekke invoked the Fifth Amendment, “all of his testimony is going to be stricken because he can’t choose to answer questions selectively.” 7RP 52.

down the hill to my house down in Castle Rock and called [Brekke] at the beach.” 7RP 83. He called the police after speaking with Brekke and returned to Brekke’s house but did not see anyone around the house. 7RP 83-84.

Jason Norris testified that he “ran into” B.J.S. on the evening of November 18, 2005. 7RP 63-64. He and B.J.S. decided to pick up a couple of girls and go to Bob Brekke’s house to party. 7RP 64-65, 92-93. Brekke was not at home but Norris had lived at the house and he and B.J.S. had permission to be at the house at any time. 7RP 64, 68, 90-91. Norris and B.J.S. had previously spent the night at Brekke’s house numerous times. 7RP 69, 89-90. Both Norris and B.J.S. had the alarm code to enter Brekke’s house. 7RP 64-65, 68.

While they were at the house, Norris started taking things, “[T]he purpose when we first went up there was to party. It evolved later on when I was casing through the house.” 7RP 65, 99. Norris took electronic devices, credit cards, and cash. 7RP 66. B.J.S. did not take anything or help him and “at some point also tried to talk me out of doing what I was doing.” 7RP 71, 93, 98-99. Norris explained that earlier in the day he had thought about “taking some stuff” from Brekke’s house when his friend James gave him the idea, but it was “kind of spur of the moment” when it happened. 65, 91-92. Norris wanted B.J.S. with him that evening to make

sure the alarm code was correctly entered and if someone he did not know arrived at the house because B.J.S. was more acquainted with Brekke, "I'd only been around Bob for a few weeks." 7RP 72.

They left the house at around six o'clock the next morning and went into town, "I dropped the girls and Brandon off somewhere on Alabama." 7RP 94. Sometime between eleven and twelve o'clock, Norris picked up James and B.J.S. and returned to Brekke's house "with the intention originally to get my car that was stuck." 7RP 95. Norris admitted taking the credit cards that morning and that he and James used bolt cutters to break into an outbuilding on the property but did not take anything out of there, "I was actually up there for my car. [B.J.S.] was up there helping me get my car. You know I just got kinda out of control once we got James up there at that point." 7RP 102-03.

B.J.S.'s mother, Virginia Schlais, testified that B.J.S. stayed over at Brekke's house numerous times and Brekke gave him permission to be there when he was not at home. 7RP 105-08. When she learned that Brekke was giving B.J.S. money, she spoke with Brekke, "I said [B.J.S.] was not allowed to have money, he has to earn his money." 7RP 108-09. Norris' former girlfriend, Linda Kelley, testified that she went with Norris and B.J.S. to Brekke's house three times, once when Brekke was not at

home, "they were allowed to be there any time they wanted." 7RP 111-12.

B.J.S. testified that he stayed at Brekke's house a lot, had permission to be there when he was not at home, and had permission to be there with Norris. 7RP 114. Brekke told him where to find the house key and gave him the access code for the alarm. 7RP 115. On the night of November 17, 2005, B.J.S. went to Brekke's house with Norris and a couple of girls. He did not take anything from Brekke's house and did not see Norris take anything. 7RP 114-16. They left the house at 6 o'clock the following morning and Norris dropped him and the girls "off on Alabama." 7RP 116. Later that morning, Norris returned with James, picked him up, and they went back to Brekke's house. He did not see Norris or James take anything from the house. 7RP 116-17.

The court found B.J.S. guilty of residential burglary and theft in the second degree under accomplice liability:

I'm satisfied that Mr. Norris went there to rip Mr. Brekke off and that [B.J.S.] went there with him to aide and abet him. I don't think there's any testimony as to value. I'm not sure when the thefts took place. Whether there was two or one. Theft of credit cards is a theft in the second degree. So I'm finding him guilty of one count of Residential Burglary and one count Theft in the Second Degree. All he has to do is assist in taking and getting in the house and then he's liable for everything that's taken out of the house.

7RP 126.

Defense counsel informed the court that she intended to make a motion for a deferred disposition because B.J.S. had no criminal history. The court determined that a deferred disposition was not available to him because such a motion must be filed at least fourteen days before trial. 7RP 129-31. Defense counsel replied, "Well my client may have an issue for appeal because I was unaware of that and I have advised them that if he went to trial that he could seek a deferred." 7RP 131.

C. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO FIND B.J.S. GUILTY OF RESIDENTIAL BURGLARY AND THEFT IN THE SECOND DEGREE UNDER ACCOMPLICE LIABILITY.

There was insufficient evidence to find B.J.S. guilty of residential burglary and second degree theft under accomplice liability because the State failed to prove beyond a reasonable doubt that he aided or agreed to aid co-defendant Jason Norris in planning or committing burglary and theft. B.J.S.'s convictions must therefore be reversed and dismissed.

In a criminal prosecution, due process requires that the State prove every element necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Wash. Const. art. 1, sect. 3. "The reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the

facts in issue.’ ” State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995) (quoting In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)).<sup>6</sup>

The 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 all the elements of the crime beyond a reasonable doubt. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A challenge to the sufficiency of the evidence admits the truth of the State’s evidence and all reasonable inferences that can be drawn therefrom. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

Dismissal is required following reversal for insufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (the double jeopardy clause of the Fifth Amendment protects against a second prosecution for the same offense after reversal for insufficient evidence).

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<sup>6</sup> The United States Supreme Court noted, “It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of guilt with utmost certainty.” In re Winship, 397 U.S. at 364.

A defendant whose conviction has been reversed based upon insufficient evidence cannot be retried. State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982), cert. denied, 459 U.S. 842, 103 S. Ct. 93, 74 L. Ed. 2d 85 (1982) (citing Hudson v. Louisiana, 450 U.S. 40, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981); Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1, (1978)).

A person is guilty of residential burglary if, “with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.” RCW 9A.52.025(1).

A person is guilty of theft in the second degree if he “commits theft of an access device.” RCW 9A.56.040(1)(c).

A person is guilty of a crime if he is an accomplice of another person in the commission of the crime. RCW 9A.08.020(1)(2)(c).

RCW 9A.08.020 provides in relevant part as follows:

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he

...

(ii) aids or agrees to aid such other person in planning or committing it.

Physical presence and assent alone are insufficient to constitute aiding and abetting. Something more than presence and knowledge of the

crime must be shown to establish the intent requisite to a finding of accomplice liability. In re Wilson, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979) (citing State v. Peasley, 80 Wn. 99, 141 P. 316 (1914); State v. Redden, 71 Wn.2d 147, 426 P.2d 854 (1967)). One's presence at the commission of a crime, even coupled with a knowledge that one's presence would aid in the commission of the crime, will not subject an accused to accomplice liability. To prove that one present is an aider, the State must establish that one is ready to assist in the commission of the crime. State v. Rutunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981). "One does not aid and abet unless, in some way, he associates himself with the undertaking, participates in it as in something he desires to bring about, and seeks by his action to make it succeed." State v. J-R Distributions, Inc., 82 Wn.2d 584, 593, 512 P.2d 1049 (1973), cert. denied, 418 U.S. 949, 94 S. Ct. 3217, 41 L. Ed. 2d 1166 (1974).

In State v. Amezola, 49 Wn. App. 78, 741 P.2d 1024 (1987), this Court reversed and remanded to the trial court, holding that there was insufficient evidence to find the appellant, Ramirez, guilty of possession of heroin with intent to deliver under accomplice liability. Id. at 90-91. Ramirez was living in a house with three other co-defendants charged with possession with intent to manufacture or deliver a controlled substance. Ramirez cooked and cleaned for the three men. She was present when the

men cut and packaged the heroin and she knew where and when the deliveries were made. When the officers searched the house, they found over \$6000 in U.S. funds and Guatemalan and Mexican currency in a bedroom Ramirez shared with one of the men. *Id.* at 80-83. This Court determined that her presence and assent were insufficient to establish accomplice liability, “Although we view the evidence in a light most favorable to the State, there is not even an inference of Ramirez’ liability as an accomplice.” *Id.* at 89.

Similarly, there was insufficient evidence to find B.J.S. guilty of residential burglary and theft in the second degree under accomplice liability. Norris testified that he and B.J.S. took two girls to Brekke’s house to party. 7RP 64-65, 92-93. Although Brekke was not at home, B.J.S. and Norris had permission to be at the house at any time. They both knew the alarm code but B.J.S. entered the code to get into the house that night. 7RP 64-65, 68-69, 89-91. Norris admitted that while they were at the house, he started taking things, “[T]he purpose when we first went up there was to party. It evolved later on when I was casing through the house.” 7RP 65, 99. Norris described the theft as “kind of spur of the moment.” 7RP 65. Although B.J.S. saw him taking things, he did not help him and “at some point tried to talk me out of doing what I was doing.” 7RP 65, 93, 98-99.

Norris, B.J.S., and the girls left the house at 6 o'clock the following morning. 7RP 94. Norris, his friend James, and B.J.S. returned later that day to get Norris' car that was left at Brekke's house because it "was stuck." 7RP 95. Norris admitted taking credit cards from the house that morning and that he and James used bolt cutters to break into an outbuilding on the property but did not take anything out of there, "I was actually up there for my car. [B.J.S.] was up there helping me get my car. You know I just got kinda out of control once we got James up there at that point." 7RP 102-03.

B.J.S.'s mother, Virginia Schlais, testified that B.J.S. stayed over at Brekke's house numerous times and had permission to be there when Brekke was not at home. 7RP 105-06. Norris' former girlfriend, Linda Kelley, testified that she went with Norris and B.J.S. to Brekke's house three times, once when Brekke was not at home, "they were allowed to be there any time they wanted." 7RP 111-12. B.J.S. testified that he stayed at Brekke's house a lot, had permission to be there when he was not at home, and had permission to be there with Norris. 7RP 114.

Like in Amezola, B.J.S.'s presence and assent was insufficient to establish accomplice liability. The record substantiates that B.J.S. never intended to help Norris commit burglary and theft. He had permission to be at Brekke's house and went there to party with Norris and the girls. He

returned the next day with Norris to help him get his disabled car. There was no testimony as to how they reentered the house when Norris took the credit cards. At some point B.J.S. tried to talk Norris out of the theft. Clearly, B.J.S. did not participate in the crime “as in something he desires to bring about” nor was he “ready to assist” Norris in committing the crime. J-R Distribs., Inc., 82 Wn.2d at 593; Rutunno, 95 Wn.2d at 933.

Reversal and dismissal is required because more than presence and knowledge of a crime must be shown “to establish the intent requisite” to a finding of accomplice liability. In re Wilson, 91 Wn.2d at 492.

2. THE TRIAL COURT’S FINDINGS OF FACT ARE UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND FAIL TO SUPPORT ITS CONCLUSIONS OF LAW.

Reversal is required because the trial court erred in entering findings of fact unsupported by substantial evidence which consequently fail to support its conclusions of law.

On appeal, the Court reviews whether the trial court’s findings of fact are supported by substantial evidence and whether the findings support the trial court’s conclusions of law. State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). The trial court’s findings of fact will be upheld if supported by substantial evidence. State v. Mewes, 84 Wn. App. 620, 622, 929 P.2d 505 (1997). “Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the

finding.” State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). In finding substantial evidence, we cannot rely upon guess, speculation, or conjecture. State v. Prestegard, 108 Wn. App. 14, 22-23, 28 P.3d 817 (2001) (citing State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972)).

The record reveals that Findings of Fact 2, 3, 4, and 5 are unsupported by substantial evidence. Supp. CP \_\_\_ (sub. no. 44, supra).

In Finding of Fact 2, the court erroneously found that the “co-defendant Jason Norris was taking the fall for the Respondent” because there is nothing in the record to support the court’s arbitrary finding. See 7RP 63-73, 87-103.

In Finding of Fact 3, the court erroneously found that “there was no evidence that Jason Norris knew the security code to Robert Brekke’s home.” To the contrary, Norris testified that he had lived at Brekke’s house and had the alarm code for a couple of weeks. 7RP 64-65, 68-69. Furthermore, Norris’ girlfriend, Linda Kelley, testified that she went to Brekke’s house with Norris and B.J.S. several times and that Norris probably had the alarm code because “they were allowed to be there any time they wanted.” 7RP 111-12.

In Finding of Fact 4, the court erroneously found that B.J.S. “was brought along to enter the security access code and to deal with any

visitors that may show up at the home while the burglary was in progress.”

The court’s finding misstates the record because Norris testified that they went to Brekke’s house to party and he started taking things after looking around the house:

Q. Um . . . When you testified. You testified just previously that [B.J.S.] did not assist you in taking any of his stuff. Um . . . He didn’t physically carry anything out correct?

A. No.

Q. But uh . . . You would agree that he knew you were taking things from the residence?

A. Yes and he at some point tried to talk me out of doing what I was doing.

Q. Um . . . When you -- When I called you to testify the first time you stated that I asked you why you brought [B.J.S.] and you stated that one: to enter the code, to make sure the code was entered correctly, is that --

A. Um hum.

Q. Is that a true statement? Okay um . . . and I believe you also stated that you wanted [B.J.S.] there in case someone you didn’t know arrived to the residence, is that also correct?

A. Yes there was also another reason. The fact that I wasn’t going to go up in there and screw this guy off that he had a friendship with, you, know, unless I told him about it. I wasn’t going to go up there behind his back and do this.

Q. Okay. So he knew the purpose of going up there that evening?

A. No the purpose when we first went up there was to party. It evolved later on when I was casing through the house.

7RP 98-99.

There was no evidence that B.J.S. was there to help Norris burglarize Brekke's house.

In Finding of Fact 5, the court erroneously found that B.J.S. "fled the scene of the crime which is contrary to having permission to be on the property." The record reflects there was no evidence that B.J.S. fled from the house. Both Norris and B.J.S. testified that James was with them when they returned to Brekke's house. 7RP 95, 116. Although Tim Entler testified that he saw two kids running from the house, he could not identify B.J.S., "I can't say I saw him specifically because I didn't see his face." 7RP 78. When defense counsel asked if he saw B.J.S. running from the house, Entler replied, "No." 7RP 81.

The trial court erred in entering Findings of Fact 2, 3, 4, and 5, which are unsupported by substantial evidence. Findings of Fact 1 and 7 only establish that B.J.S. went to Brekke's home located in Cowlitz County. Consequently, reversal is required because the court's findings fail to support its conclusions of law that B.J.S. is guilty of Count I:

Residential Burglary and Count IV: Theft in the Second Degree for aiding and abetting in the commission of these crimes.

3. B.J.S. WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE DEFENSE COUNSEL FAILED TO PROPERLY ADVISE HIM OF HIS ELIGIBILITY FOR DEFERRED DISPOSITION PRIOR TO TRIAL.

Reversal is required because defense counsel failed to properly advise B.J.S. of his eligibility for deferred disposition prior to trial, violating his constitutional right to effective assistance of counsel.

In all criminal prosecutions, an accused has a constitutional right to assistance of counsel. U.S. Const. amend. 6; Const., art. 1, sect. 22. Courts have interpreted this constitutional right to counsel as a guarantee of effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn. 2d 61, 77-78, 917 P.2d 563 (1996).

There is a two-part test to establish a claim of ineffective assistance of counsel. First, the defendant must show that counsel's performance was deficient. Second, the defendant must show that the deficient performance was prejudicial. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

This Court reviews a claim of ineffective assistance of counsel de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

In 1997, the Washington State Legislature amended the Juvenile Justice Act of 1977 with an increased emphasis on responding to the needs of juvenile offenders. State v. J.H., 96 Wn. App. 167, 172, 978 P.2d 1121 (1999), cert. denied sub nom, Anderegg v. Washington, 529 U.S. 1130, 120 S. Ct. 2005, L. Ed. 2d 956 (2000). One of the amendments was the adoption of RCW 13.40.127, authorizing deferred dispositions of juvenile offenders:

**13.40.127. Deferred Prosecution**

....

(3) The juvenile court may, upon motion at least fourteen days before commencement of trial and, after consulting the juvenile's custodial parent or parents or guardian and with the consent of the juvenile, continue the case for disposition for a period not to exceed one year from the date the juvenile is found guilty. The court shall consider whether the offender and the community will benefit from a deferred disposition before deferring the disposition.

During the deferral period, the juvenile must comply with conditions of community supervision. RCW 13.40.127 (5). If at the end of the deferral, the juvenile has complied with all the conditions, the court will vacate the conviction and dismiss the case with prejudice. RCW 13.40.127 (9).

Here, at the conclusion of the adjudication hearing, the court found B.J.S. guilty of residential burglary and theft in the second degree. 7RP

126. After the court's ruling, defense counsel, Tierra Busby, moved for a deferred disposition:

MS. BUSBY: We would be making a Motion for Deferred -- we have no criminal history and we would make the Motion right now.

....

MS. BUCHANAN [Probation Officer]: Your Honor, I know I'm not an attorney. My understanding of the statute which I'm trying to find is that you have to plead guilty to get a deferred disposition by statute. I'm not opposed to deferred disposition in query [sic] but by statute I think you have to plead guilty and make the motion. In fact you're supposed to make a motion to this prior to trial. I am not like I said I'm not. -- If he is eligible for deferred that's not the issue from perspective at all.

THE COURT: Is he legally eligible?

MS. BUCHANAN: That's right.

THE COURT: I'm just looking at the deferred dispositions and they say . . . it's 13.40.127.

MS. BUSBY: Yes, Your Honor.

THE COURT: Subsection 2 -- "The juvenile court may, upon motion at least fourteen days before commencement of the trial and, after consulting the juvenile's custodial parents . . . continue the case for disposition for a period not to exceed one . . ." (3) Any juvenile who agrees to a deferral of disposition shall: . . . Stipulate to the admissibility . . . Acknowledge that the report will be entered . . . Waive the following rights . . ."

MS. BUCHANAN: That's my understanding not any personal thing against [B.J.S.] at all.

THE COURT: I don't think it's available to him.

MS. BUSBY: Well my client may have an issue for appeal because I was unaware of that and I have advised them that if he went to trial that he could seek a deferred. So I'll just state that on the record.

THE COURT: Okay.

7RP 129-31.

Defense counsel's performance was deficient because she incorrectly advised B.J.S. that he could move for a deferred disposition if he did not prevail at trial. Her performance fell below an objective standard of reasonableness because she failed to research the applicable law. The statute clearly states that a motion for a deferred disposition must be made at least fourteen days before trial.<sup>7</sup>

Counsel's deficient performance prejudiced B.J.S. because if counsel had properly advised him that he was eligible for a deferred disposition, he could have avoided the risk of a conviction at trial.<sup>8</sup> It is likely that the court would have recognized the benefit of a deferred disposition in light of the court's comments prior to sentencing:

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<sup>7</sup> "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." RPC 1.1

<sup>8</sup> B.J.S. was eligible for deferred disposition because he was not charged with a sex or violent offense, had no criminal history, and had no prior deferred dispositions or adjudications. RCW 13.40.127 (1).

This is a young man here who is in a very bad situation. He has a very flat affect all during this whole thing. He's got himself in some trouble. What we do here in Juvenile Court is try to get kids out of the system. That's really what we're trying to do is get them out. And I'd like some idea what's the best way to make sure that [B.J.S.] gets out of the system and never comes back.

7RP 137.

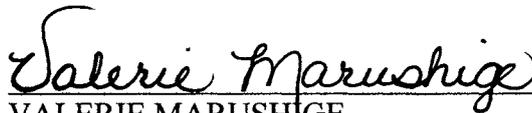
Reversal is required because B.J.S. was denied his constitutional right to effective assistance of counsel. Strickland, 466 U.S. at 687.

D. CONCLUSION

For the reasons stated, this Court should reverse and dismiss B.J.S.'s convictions.

DATED this 15<sup>th</sup> day of August, 2006.

Respectfully submitted,



VALERIE MARUSHIGE  
WSBA# 25851  
Attorney for Appellant

## **APPENDIX A**



Conclusions of Law

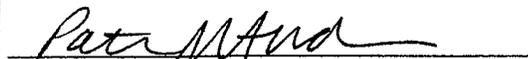
1. The Respondent is guilty of Count I: Residential Burglary, and Count IV: Theft in the Second Degree.
2. The Respondent is not guilty of Counts II and III.
3. Count V: Taking a Motor Vehicle Without Permission was dismissed prior to the presentation of the Respondent's case.
4. The Respondent aided and abetted in the commission of these crimes.
5. Counts I and II, Residential Burglary, were considered same criminal conduct and are to be deemed one act.
6. All the elements of Residential Burglary and Theft in the Second Degree, theft of an access device, were satisfied.

DATED this 18 day of April, 2006



J U D G E

Presented by:



Patricia M. Anderson, WSBA#36410

Approved as to form:



Tierra Busby, WSBA# 30081  
Attorney for Respondent

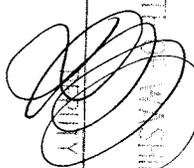
**DECLARATION OF SERVICE**

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached, to Susan I. Baur, Cowlitz County Prosecutor's Office, 312 SW First Avenue, Kelso, Washington 98626 and Brandan James Schlais, 1004 9<sup>th</sup> Avenue, Longview, Washington 98632.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 15<sup>th</sup> day of August, 2006 in Des Moines, Washington.

  
\_\_\_\_\_  
Valerie Marushige  
Attorney at Law  
WSBA No. 25851

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