

No. 36590-1-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

HENRY Q. MARSHALL,

Appellant.

FILED APPELLANTS
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Christine A. Pomeroy, Judge
Cause No. 07-1-00689-7

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in not dismissing Marshall's conviction for conspiracy to commit theft in the first degree (Count IV) where the conspiracy to commit theft was incidental to, a part of, or coexistent with his conviction for arson in the first degree (Count I).
2. The trial court erred in permitting Marshall to be represented by counsel who provided ineffective assistance in failing to argue that double jeopardy barred his conviction for conspiracy to commit theft in the first degree (Count IV) where he was also convicted of arson in the first degree (Count I).
3. The trial court erred in allowing Marshall to be convicted of Count IV where the State failed to elicit sufficient evidence of this count.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in not dismissing Marshall's conviction for conspiracy to commit theft in the first degree (Count IV) where the conspiracy to commit theft was incidental to, a part of, or coexistent with his conviction for arson in the first degree (Count I)? [Assignment of Error No. 1].
2. Whether the trial court erred in permitting Marshall to be represented by counsel who provided ineffective assistance in failing to argue that double jeopardy barred his conviction for conspiracy to commit theft in the first degree (Count IV) where he was also convicted of arson in the first degree (Count I)? [Assignment of Error No. 2].
3. Whether the trial court erred in allowing Marshall to be convicted of Count I where the State failed to elicit sufficient evidence of this count? [Assignment of Error No. 3].

C. STATEMENT OF THE CASE

1. Procedure

Henry Q. Marshall (Marshall) was charged by second amended information filed in Thurston County Superior Court as a principal or an accomplice with one count of arson in the first degree (Count I), one count of possession of stolen property in the first degree (Count II), one count of trafficking in stolen property in the first degree (Count III), and one count of conspiracy to commit theft in the first degree (Count IV). [CP 12-13].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. Marshall was tried by a jury, the Honorable Christine A. Pomeroy presiding. Prior to submitting the case to the jury, the court dismissed Counts II and III. [RP 40-43]. Marshall had no objection and took no exception to the court's instructions. [CP 19-46; RP 44]. The jury found Marshall guilty as charged on Count I—arson in the first degree and Count IV—conspiracy to commit theft in the first degree. [CP 16, 17; RP 77-81].

The court then sentenced Marshall to standard range sentences of 30-months on Count I, and 4-months on Count IV for a total sentence of 30-months.¹ [CP 47-57; RP 86-87].

¹ This court should note that Marshall's judgment and sentence contains a scrivener's error in that the sentences for Counts I and IV have been reversed.

A timely notice of appeal was filed on July 19, 2007. [CP 61-72].

This appeal follows.

2. Facts

In early April 2007, Shawn Leras (Leras), Marshall's roommate, overheard Marshall talking about getting rid of a car for insurance fraud. [RP 7-10]. A couple of days later, Leras saw Marshall leaving a gas station following a black Isuzu Rodeo and tried to call Marshall to tell him not to get involved. [RP 11-12]. That night Marshall returned and told Leras about a big fire that burned the Isuzu. [RP 12]. Leras tried to get Marshall to contact the police, but Marshall wouldn't so Leras did. [RP 13-14].

On April 7, 2007, Thurston County Sheriff Corey Morgan was dispatched to a burning vehicle off Rainier Road on Fort Lewis. [RP 20]. The vehicle, an Isuzu, was on cinderblocks with the tires removed and registered to Rodney J. and Roger J. Wilkerson. [RP 20-22]. That same morning, Lakewood Police Officer Darcy Olsen received a stolen vehicle report from John Wilkerson regarding his 2004 Isuzu Rodeo. [RP 25-26].

Kamala Wedding, a special investigation agent with Farmer's Insurance, testified that John Wilkerson made a claim regarding a 2004 Isuzu Rodeo. [RP 27]. Farmer's Insurance insured the vehicle and the owners of record were Wilkerson and his father Rodney however they

were merely lien holders as a bank actually owned the vehicle and they were making payments on a loan. [RP 27]. The balance of the loan was \$17,036. [RP 29]. Wedding testified that the fair market value of the vehicle was around \$13,000, which she was authorized to pay. [RP 29-30].

Thurston County Sheriff David Haller (Haller) testified he was contacted by Leras and because of the information Leras provided Haller verified that an Isuzu Rodeo had been burned. [RP 32-33]. Based on his investigation, Haller contacted Marshall and interviewed him taking two record statements from Marshall. [RP 33-37]. Marshall admitted to burning the vehicle because his friend, Wilkerson, wanted to get rid of it, but said nothing about any plan to defraud an insurance company nor any agreement to commit theft. [RP 33-40]. Marshall's recorded statements were played to the jury. [Supp. CP Exhibits Nos. 6, 7, 8; RP 36-37].

Marshall did not testify.

D. ARGUMENT

- (1) MARSHALL MAY NOT BE CONVICTED OF CONSPIRACY TO COMMIT THEFT IN THE FIRST DEGREE (COUNT IV) WHERE THE CONSPIRACY TO COMMIT THEFT WAS INCIDENTAL TO, A PART OF, OR COEXISTENT WITH HIS CONVICTION FOR ARSON IN THE FIRST DEGREE (COUNT I).

Article 1, section 9 of the Washington State Constitution and the Fifth Amendment to the United States Constitution provide that no person should twice be put in jeopardy for the same offense. Double jeopardy may be violated by multiple convictions even if the sentences are concurrent. State v. Calle, 125 Wn.2d 769, 775, 888 P.2d 155 (1995). A double jeopardy argument may be raised for the first time on appeal because it is a manifest error affecting a constitutional right. State v. Turner, 102 Wn. App. 202, 206, 6 P.3d 1226, *reviewed denied*, 143 Wn.2d 1009 (2001) (*citing* RAP 2.5(a) and State v. Adel, 136 Wn.2d 629, 631, 965 P.2d 1072 (1998)). The issue is whether the Legislature intended to authorize multiple punishments for criminal conduct that violates more than one criminal statute. State v. Calle, 125 Wn.2d at 772.

A three-prong test is applied to determine legislative intent. First, multiple convictions constitute double jeopardy even if the offenses “clearly involve different legal elements, if there is clear evidence that the Legislature intended to impose only a single punishment.” In the Matter

of Personal Restraint of Anthony C. Burchfield, 111 Wn. App. 892, 897, 46 P.3d 840 (2002) (*citing* State v. Calle, 125 Wn.2d at 780). Because the Legislature is free to define crimes and fix punishments as it will, “the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.” Brown v. Ohio, 432 U.S. 161, 165, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977).

Here, neither the arson in the first degree nor the conspiracy to commit theft in the first degree statutes contain specific language authorizing separate punishments for the same conduct. RCW 9A.48.020; RCW 9A.56.030; RCW 9A.28.040. The offenses at issue here are thus not automatically immune from double jeopardy analysis. In re Burchfield, 111 Wn. App. at 896.

Second, when, as here, the Legislature has not expressly authorized multiple punishments for the same act, this court applies the “same evidence test,” which asks “whether each offense has an element not contained in the other.” *Id.* The statute under which Marshall was convicted of arson in the first degree requires a fire damaging property with intent to collect insurance proceeds. RCW 9A.48.020. The conspiracy to commit theft in the first degree statute requires an agreement to wrongfully obtain/exert control of property of another with the intent to deprive said person of the property. RCWs 9A.28.040 and 9A.56.030. These offenses contain different elements and, therefore, are not established by the “same evidence.” Thus the prohibition against double jeopardy is not violated here by applying the same evidence test.

The “same evidence” test, however, is not always dispositive. In re Burchfield, 111 Wn. App. at 897; In re Personal Restraint of Percer, 150 Wn.2d 41, 50-51, 75 P.3d 488 (2003). This court must also determine whether there is evidence that the Legislature intended to treat conduct as a single offense for double jeopardy purposes. Id. This merger doctrine is simply another way, in addition to the “same evidence” test, by which this court may determine whether the Legislature has authorized multiple punishments. State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996). “Thus, the merger doctrine is simply another means by which a court may determine whether the imposition of multiple punishments violates the Fifth Amendment guarantee against double jeopardy....” Id. The question is whether there is clear evidence that the Legislature intended not to punish the conduct at issue with two separate convictions. State v. Calle, 125 Wn.2d at 778. If a defendant is convicted of two crimes, his or her second conviction will stand if that conviction is based on “some injury to the person or property of the victim or others, *which is separate and distinct from and not merely incidental to the crime of which it forms the element.* [Emphasis Added]. State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).

Here, Wilkerson's Isuzu Rodeo on which Wilkerson was still making payments was burned at his request by Marshall and another accomplice with Wilkerson then claiming it was stolen and submitting an insurance claim. This court should construe this as evidence that the first crime (arson in the first degree as the court instructed in Instruction No. 13, [CP 34], a burning for the purposes of collecting insurance proceeds) was not completed as the second crime (conspiracy to commit theft in the first degree—an agreement to wrongfully deprive the owner of property) was in progress, then the conspiracy to commit theft *was incidental to, a part of, or coexistent with the arson in the first degree*, with the result that the second conviction (conspiracy to commit theft in the first degree (Count IV)) will not stand under the reasoning in State v. Johnson, *supra*.

The Washington Supreme Court has observed that “[t]he United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges.” State v. Adel, 136 Wn.2d at 635. Accordingly, if this court determines that the conspiracy to commit theft in the first degree (Count IV) “was incidental to, a part of, or coexistent” with the arson in the first degree (Count I), then Marshall's conviction in Count IV cannot be sustained on these facts and must, therefore, be reversed.

Recently, in State v. Wanrow, 91 Wn.2d 301, 588 P.2d 1320 (1978), the State Supreme Court rejected an argument that a defendant cannot be convicted of both felony murder and the underlying felony. The court upheld both convictions by considering statutory merger and due process finding neither principle was violated. However, recently in State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007), the State Supreme Court apparently reversed this decision by analyzing the issue in terms of double jeopardy.

In Womac, the defendant was charged in three separate counts and convicted of homicide by abuse, felony murder based on criminal mistreatment, and assault. The trial court accepted all three convictions, but imposed sentence only on the homicide by abuse. On appeal, remanded the case for resentencing on the homicide by abuse and conditionally dismissed the felony murder and assault convictions so long as the homicide by abuse conviction withstood further appeal. The State Supreme Court vacated the felony murder and assault convictions on double jeopardy grounds holding Womac had in actuality committed a single offense against a single victim yet was held accountable for three crimes in violation of double jeopardy prohibition against multiple punishments for a single offense. In doing so, the State Supreme Court engaged in the three-part analysis set forth above. The State Supreme

Court determined that double jeopardy was violated even though Womac received no sentence on the felony murder and assault convictions as “conviction” in itself, even without imposition of sentence, carries an unmistakable onus which has a punitive effect. In sum, the court held:

As this court noted in Calle, “[i]t is important to distinguish between charges and convictions—the State may properly file an information charging multiple counts under various statutory provisions where evidence supports the charges, *even though convictions may not stand* for all offenses where double jeopardy protections are violated.

[Citations omitted]. State v. Womac, 160 Wn.2d at 657-58.

Here, more egregious than the facts of Womac, the State properly filed an information charging multiple counts (the arson in the first degree based on an intent to collect insurance proceeds and conspiracy to commit theft in the first degree), obtained convictions on these multiple counts, but Marshall was also sentenced on these multiple counts. All the convictions cannot stand given double jeopardy principles for the reasons set forth above—the single act of burning Wilkerson’s truck at his request cannot also sustain a conviction and sentence for conspiracy to commit theft. This court should reverse Marshall's convictions on Count IV.

(2) MARSHALL WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO ARGUE DOUBLE JEOPARDY FOR THE REASONS SET FORTH IN SECTION (1).²

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Assuming, arguendo, this court finds that counsel waived the error claimed and argued above by failing to argue double jeopardy as to the

² It has been argued in the preceding sections of this brief that the issues can be raised for the first time on appeal. This portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

conspiracy to commit theft and arson in the first degree, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to make this argument where if it had been made Marshall would have been convicted of fewer crimes .

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is apparent in that Marshall would have been convicted of fewer crimes and his total sentence would be reduced if the double jeopardy arguments had been made, had counsel done so, the outcome would have been different.

- (3) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT MARSHALL WAS GUILTY OF CONSPIRACY TO COMMIT THEFT IN THE FIRST DEGREE (COUNT IV).

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 would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d

1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, the State charged and Marshall was convicted of conspiracy to commit theft in the first degree (Count IV). Given the facts of this case, the State bore the burden of establishing beyond a reasonable doubt that Marshall knew that the Isuzu Rodeo was owned by the bank when he agreed to burn it at Wilkerson’s request. This is a burden the State cannot sustain.

The Sum of the State’s evidence against Marshall on this count included the fact that Wilkerson’s Isuzu Rodeo was burnt, and Marshall admitted to doing the same at Wilkerson’s request because Wilkerson didn’t want it (the Isuzu Rodeo) any more as set forth in his statements to the police. While it is true according to Kamala Wedding’s testimony that a bank technically owned the Isuzu as Wilkerson was still making

payments on the vehicle, there is no evidence that Marshall knew this fact and therefore could not have conspired to wrongfully obtain property of another with the intent to deprive the owner of the property as required to sustain the conviction in Count IV of conspiracy to commit theft in the first degree—the evidence establishes that Marshall agreed to burn what he believed was Wilkerson’s property at Wilkerson’s request. This court should reverse and dismiss Marshall’s conviction in Count IV.

E. CONCLUSION

Based on the above, Marshall respectfully requests this court to reverse and dismiss his conviction in Count IV.

DATED this 14th day of January 2008.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 14th day of January 2008, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 14th day of January 2008.

Patricia A. Pethick
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