

NO. 42714-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

SCOTT E. COLLINS,

Appellant.

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

The Honorable James J. Stonier, Judge
The Honorable James Warme, Judge
The Honorable Stephen Warning, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial erred in refusing to grant Mr. Collins' motion to sever Counts 1-4¹ from Counts 5-15.

2. There was insufficient evidence that Mr. Collins committed burglary in the second degree (Count 1).

3. There was insufficient evidence that Mr. Collins committed malicious mischief in the second degree (Count 3).

4. There was insufficient evidence that Mr. Collins trafficked in stolen property (Count 4).

5. There was insufficient evidence that Mr. Collins committed financial fraud (Count 5).

6. There was insufficient evidence that Mr. Collins committed identity theft in the second degree (Count 6).

7. There was insufficient evidence that Mr. Collins possessed stolen property in the third degree (Count 14).

8. The trial court commented on the evidence when it gave a limiting instruction that the jury did not need to give any weight to the testimony of defense witness Charlie Reynolds.

9. Mr. Collins was denied effective counsel by his attorney's failure to object to testimony that a police officer contacted a specific person by phone.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err when it refused to sever Counts 1-4 from Counts 5-15?

2. Was there sufficient evidence to prove Mr. Collins committed second degree burglary as to Count 1?

¹ The Second Amended Information uses roman numerals for each count. CP ("Clerk's Papers") 46-51. For ease of reading, Mr. Collins refers to the counts more simply by their more recognizable Arabic equivalents, "1, 2, 3," etcetera.

3. Was there sufficient evidence to prove Mr. Collins committed second degree malicious mischief as to Count 3?
4. Was there sufficient evidence to prove Mr. Collins committed first degree trafficking in stolen property as to Count 4?
5. Was there sufficient evidence to prove Mr. Collins committed financial fraud as to Count 5?
6. Was there sufficient evidence to prove Mr. Collins committed identity theft as to Count 6?
7. Was there sufficient evidence to prove Mr. Collins committed possession of stolen property in the third degree as to Count 14?
8. Did the trial court, in giving an oral limiting instruction, comment on the evidence when it told the jury they need not give any weight to defense witness Charlie Reynolds' testimony?
9. When the only evidence a supposed person even exists is hearsay from a police officer, and the evidence is necessary to establish an element of a crime, is it ineffective assistance to fail to object to the testimony?

C. STATEMENT OF THE CASE

1. Pre-trial motions.

In its original Information, the State charged Scott Collins with four crimes: burglary in the second degree,² Count 1; theft in the second degree,³ Count 2; malicious mischief in the second degree,⁴ Count 3; and

² RCW 9A.52.030

³ RCW 9A.56.040(1)(a)

⁴ RCW 9A.48.080(1)(a)

trafficking in stolen property in the first degree,⁵ Count 4. CP 1-3. All of the charges alleged an August 28, 2010, incident date. CP 1-3. Two and a half months later, the State filed an Amended Information adding ten additional charges: financial fraud,⁶ Count 5; identity theft in the second degree,⁷ Counts 6-11; forgery,⁸ Count 12; and possession of stolen property in the third degree,⁹ Counts 13-15. CP 4-9. Finally, seven months later, on the eve of trial, the State filed a Second Amended Information amending Count 7 from identity theft to possession of stolen property in the third degree. CP 46-51; 3RP¹⁰ (“Report of Proceedings) at 274-75.

Prior to trial, Mr. Collins moved to sever Counts 1-4 from Counts 5-15. 3RP at 252-74. Evidence of all of the Counts were seized during the service of a search warrant. CP 44. However, the burglary and related charged in Counts 1-4 had little relation to the allegations of stolen and forged paperwork in Counts 5-15. Mr. Collins argued prejudice in the sense that Counts 5-15 did nothing other than allow the jury to infer a general criminal disposition. CP 45; 3RP 255-68. The judge who heard

⁵ RCW 9A.82.050(1)

⁶ RCW 9A.56.320(2)(a)

⁷ RCW 9.35.020(1) & (3)

⁸ RCW 9A.60.020(1)

⁹ RCW 9A.56.170

¹⁰ There are 5 volumes of verbatim for each case. In citing to the record, the specific volume where the page is found will proceed the “RP”.

the severance motion, Judge Stonier, denied it. 3RP at 269-70. Mr. Collins renewed his severance motion twice thereafter, once at the beginning of trial and again before the State presented rebuttal testimony. 3RP at 280, 4RP at 505. The trial judge, Judge Warning, allowed Judge Stonier's denial to stand. 3RP at 281; 4RP at 505.

Also, prior to trial, Mr. Collins brought a motion to suppress evidence seized from a truck he was driving when stopped by the police and from his trailer parked at his parents' Castle Rock property. CP 10-42; 2RP at 55-237. Judge Warne heard the suppression motion and denied all of it except for suppressing evidence seized from a folder found on a table in the trailer. 2RP at 230, 237.

2. Trial facts.

Late afternoon on August 28, 2010, Mr. Collins was stopped by Castle Rock Police Officer Jeffery Gann. 3RP at 329.¹¹ Mr. Collins was driving a red or orange 1970s Dodge truck. 3RP at 316, 325, 332. The truck belonged to Mr. Collins' father. 3RP at 315. There were three other people in the truck with Mr. Collins 3RP at 332.

Several police officers were at the stop. 3RP at 293, 371. They noticed a green Hitachi air compressor in the truck's open bed. 3RP at

¹¹ The purpose of the stop had no bearing on this case. It was the subject of a motion in limine. There was an agreement that the details would not be mentioned to the jury. 3RP at 277.

332. Officer Gann took a theft report earlier in the day. 3RP at 326; 4ARP at 409. An unknown person or persons entered a Castle Rock home that was under construction. 4ARP at 402-09. The home was one of eight “sweat equity” homes in a Castle Rock development. 4ARP at 403. Stolen from the home was a large amount of wire and a green Hitachi air compressor. 4ARP at 407-11. The home was wired just the evening before. 4ARP at 415-16. A person or persons entered the home and damaged 100% of the wire downstairs and 30% of the wire upstairs. 4ARP at 420. Not all of the wire was removed. 4ARP at 419. The wire was copper wire. 3RP at 345; 4ARP at 424-425, 432. The police theorized it was stolen to sell to a recycle dealer for scrap. 3RP at 345.

The police made some phone calls and confirmed the green air compressor was the compressor stolen from the CAP home. 3RP 334-35. The compressor had been altered slightly; the CAP marking had been rubbed or scraped off. 4ARP at 410. The compressor was valued at about \$150. 4ARP at 411.

Mr. Collins was arrested for possession of stolen property (the air compressor). 3RP at 335. The police then headed over to Mr. Collins’ parents’ house. 3RP 294, 337. Mr. Collins’ step-mother, Norma Jean Collins, came to the scene of the stop to retrieve the truck. 3RP at 317. She drove it home. *Id.* Once the police arrived, she was particularly

cooperative. 3RP at 317. She showed the police around the property. 3RP at 317, 338. She took them to the fifth wheel trailer where Mr. Collins lived. 3RP at 318. Brandon Montreal was there. 3RP at 299, 320. He lived in the trailer with Mr. Collins. 3RP at 320. The police noticed yellow and white wire shavings outside the trailer. 3RP at 338. The police retreated and got a warrant to search the trailer. 3RP at 339.

During the search, the police found lots of white and yellow wire shavings in the trailer. 3RP at 341-42. The predominant color of the plastic-coated wire from the CAP home was white and yellow. 4ARP at 424-25. There was also a garbage bag on the trailer's floor. It was full of wire casings. 3RP at 338. The police also found some tools in the trailer that could have been used to scrape plastic coating from wire. 3RP at 379. The police made no effort to get fingerprints from any potential evidence. 2RP at 350.

There was a camouflage-colored backpack discovered in the back of the truck. 3RP at 345. It contained copper wire stripped of its plastic coat and organized into balls. 3RP at 345; 4ARP at 432. The electrician who had hung the wire, testified that the wire in the backpack was likely the wire from the CAP home. 4RP at 432. He and an assistant rewired the home the next day. 4ARP at 422-23. The cost of replacement wire and labor was approximately \$2,650. *Id.*

Charlie Reynolds testified at trial that he, and he alone, went to the CAP house and cut out the wire and took the air compressor. 4BRP at 448-84. He lugged the stolen goods off and stashed them. 4BRP at 450. They were heavy. He needed to get away so he called Mr. Collins for a ride. 4BRP at 450, 454. He did not explain to Mr. Collins why he needed the ride. 4RP at 454. When Mr. Collins arrived, Reynolds just loaded the stolen items into the bed of Mr. Collins' red Dodge. Reynolds thought it was around midnight. 4BRP at 452. By happenstance, Officer Gann noticed Mr. Collins driving the red Dodge in an area a few minutes away from the CAP development around 3 a.m. on the same day of the traffic stop. 3RP at 323.

Mr. Reynolds planned to keep all the wire and the anticipated proceeds for himself. 4BRP at 457. He went back to Mr. Collins trailer with Mr. Collins where he spent several hours using a pocket knife to scrape the plastic coating from the copper wire. 4BRP at 455. Mr. Collins did nothing to help or encourage him. 4BRP at 455-57.

In serving the search warrant, the police went through a cabinet and a drawer. 3RP at 296-98, 373-378. The police found various social security cards, pieces of mail, and driver's licenses. *Id.* One license, ostensibly issued by Texas, had the name Patrick Kent on it, but the picture was of Mr. Collins. 3RP at 296-98, 319-20. Counts 5-15 related

to the material found in the cabinet and the drawer. CP 48-50. Each of the charges list a name or names that correspond to the name on a piece or section of the material taken from the drawer and cabinet. 3RP at 296-98, 319-20; CP 48-50. Some of the named people testified at trial. See Counts 7, 8, 9, 13, and 15. And some did not. See Counts 6, 7, 12, and 14. 3RP at 288-291, 310-311367-370; 4ARP at 394-97, 398-401. At the end of the State's case, the trial court dismissed Counts 10 and 11 because sufficient evidence did not support them. 4BRRP at 441.

Mr. Collins did not testify at trial. He was convicted of all counts except the dismissed counts 10 and 11. CP 106-09, 111-12, 114, 116, 118-21, 160. He received an 84 month sentence. CP 130. He now appeals. CP 139-156.

D. ARGUMENT

1. MR. COLLINS WAS DENIED A FAIR TRIAL WHEN THE COURT REFUSED TO SEVER COUNTS 1-4 FROM COUNTS 5-15.

CrR 4.3(a) permits two or more offenses to be joined when the offenses are of the same or similar character. The trial court should sever the counts if it will “promote a fair determination of the defendant's guilt or innocence of each offense.” CrR 4.4(b). A defendant who opposes joinder must demonstrate that it is so manifestly prejudicial that it outweighs the interest of judicial economy. *State v. Bythrow*, 114 Wn.2d

713, 718, 790 P.2d 154 (1990). In determining whether two counts should be tried together, a court must consider (1) the strength of the State's evidence on each count; (2) the clarity of the separate defenses; (3) the court's instructions directing the jury to consider each count separately; and (4) the admissibility of the evidence of one charge in a separate trial of the other charge. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994).

As argued below, there was little to no strength in the Counts 1-4 with the arguable exception of Count 2, theft in the second degree. The defense was general denial on all the charges. The trial court did instruct the jury it must decide each count separately. CP 59 (Instruction 5). The evidence from Counts 5-15 had no bearing whatsoever on the burglary and theft in Counts 1-4.

2. THE EVIDENCE DID NOT PROVE MR. COLLINS COMMITTED COUNTS 1, 3, 4, 5, 6, AND 14.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from that evidence. *Salinas*, 119

Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

a. Count 1, second degree burglary. To prove this crime, the State had to prove that Mr. Collins, or an accomplice, entered or remained unlawfully in the CAP house with the intent to commit a crime against a person or property therein. CP 62 (Instruction 8). Charlie Reynolds testified that he acted alone in committing the burglary. No evidence suggests otherwise. Mr. Collins did pick Reynolds up after the burglary. Reynolds had an air compressor and copper wiring with him. At best, this makes Mr. Collins an accomplice to theft. Accomplice liability requires proof of knowledge that it will promote or facilitate “the crime.” CP 60 (Instruction 6). There was no testimony that Mr. Collins knew Reynolds stole the air compressor or wire from a building.

b. Count 3, malicious mischief in the second degree. To prove this charge, the State must prove that Mr. Collins or an accomplice, knowingly and maliciously caused over \$750 damage to the CAP house. CP 68 (Instruction 14). The analysis here is essentially the same as above. There was no proof Mr. Collins actually went into the CAP home, knew Reynolds was going into the CAP home, or encouraged Reynolds to go into the CAP home and cut out the wire.

c. Count 4, trafficking stolen property in the first degree. To prove this charge, the State had to prove that Mr. Collins or an accomplice, knowingly trafficked in stolen property and acted with knowledge that the property was stolen. CP 71 (Instruction 17). Traffic means to buy, receive, possess, or obtain control of stolen property with the intent to sell, transfer, distribute, dispense, or to otherwise dispose of the property to another person. CP 72 (Instruction 18). As above, in viewing the evidence in the light most favorable to the State, there was no evidence Mr. Collins aided or abetted Reynolds in his scheme to steal, strip, and sell the CAP house wire.

d. Count 5, financial fraud. This requires Mr. Collins to have possessed two or more checks without the permission of Karl Tait or Mia Janssen-Tait with the intent to deprive either one of the Tait's of possession of the check or to commit theft, forgery, or identity theft. CP 79 (Instruction 25). The Tait's did not testify. Thus, there was no evidence that the Tait's did not give Mr. Collins permission to have their checkbook.

e. Count 6, identity theft in the second degree. This requires the State to prove that Mr. Collins knowingly obtained, possessed or used a means of identification of Anne Maria Janssen-Tait, a person living or dead, that he acted with the intent to commit a crime, and that he did not obtain any credit, money, good, or services other items of value. CP 84

(Instruction 30). This is essentially the same as the argument above. No one testified that Mr. Collins did not have Anne Maria Tait-Janssen's rivers license without her permission. Without that, there is no proof Mr. Collins acted with intent to commit a crime.

f. Count 14, possession of stolen property in the third degree.

The State has to prove that Mr. Collins did knowingly receive, retain or possess stolen property valued at less than \$750, he acted with the knowledge that the property was stolen or he withheld or appropriated the property to someone other than the true own or person entitled to it. CP 98 (Instruction 44). Here that property was two DSHS checks issued to Avin Minor. Minor did not testify. There was no proof that Minor even existed. No one from DSHS testified. From a cynical perspective, it is just as possible that Mr. Collins, or an associate of his, created the documents and consequently, the document weren't even stolen property.

3. THE TRIAL COURT COMMITTED REVERSIBLE CONSTITUTIONAL ERROR BY TELLING THE JURY THEY DID NOT HAVE TO BELIEVE THE TESTIMONY OF DEFENSE WITNESS CHARLIE REYNOLDS.

Article IV, Section 16 of the Washington State Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This provision prohibits a judge from "conveying to the jury his or her personal attitudes toward

the merits of the case” or instructing a jury that “matters of fact have been established as a matter of law.” *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). The court's personal feelings on an element of the offense need not be expressly conveyed; it is sufficient if they are merely implied. *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006). “Thus, any remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment.” *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Because the constitution expressly prohibits any judicial comment on the evidence, a claimed error based upon such a comment involves a manifest constitutional error that may be challenged for the first time on appeal. *Levy*, 156 Wn.2d at 719–20.

In his testimony, Charlie Reynolds took full responsibility for the burglary to the CAP home. Mr. Collins had nothing to do with it. Even when Mr. Collins picked up Reynolds after the fact, Reynolds made sure Mr. Collins did not know about the burglary. To rebut Reynolds’ claims, the State played a recording of Reynolds’ guilty plea to possession of stolen property in the second degree, theft in the second degree, and tampering with physical evidence. 4BRP at 458, 509-12. All of the charges stem from the CAP house burglary. Mr. Collins moved for, and the court agreed to give, an oral limiting instruction telling the jury that the

content of the plea hearing could only be considered in terms of impeaching Reynolds' credibility and not as substantive evidence. 4BRP at 509.

JUDGE WARNING: All right, Ladies and Gentlemen, the next thing you are going to hear is the audio portion of a court proceeding that was referred to earlier in which Mr. Reynolds pled guilty to certain charges.... Again, this is being offered for purposes of impeachment and *what weight, if any, you choose to give Mr. Reynolds' testimony.*

4BRP at 509.

By telling the jury that they did not need to give any weight to Reynolds' testimony, the court was telling the jury, that Reynolds' testimony was, in the court's opinion, untrue. This contrasts with the instruction the court gave to the jury about the testimony of all the other witnesses.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness.

CP 53 (Instruction 1).

Reynolds was the only defense witness. The court's comment on the credibility of Reynolds' testimony undermined Mr. Collins' defense. Mr. Collins is entitled to reversal of his convictions.

4. MR. COLLINS WAS DENIED CONSTITUTIONALLY GUARANTEED EFFECTIVE COUNSEL WHEN HIS ATTORNEY FAILED TO OBJECT TO POLICE OFFICER TESTIMONY ABOUT ABSENT WITNESSES.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington State Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). Effective counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An element of Count 6, identity theft in the second degree, is that Anne Maria Janssen-Tait is a “person, living or dead.” CP 48. No one from the Tate family testified at the trial. No one testified to knowing an Anne Maria Janssen-Tait. However, with no objection from defense

counsel, Officer Worley testified that he reached the Tait's by phone and that they were on an extended vacation in Europe. 3RP at 377. Officer Worley's contact with the Tait's was inadmissible hearsay.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c).

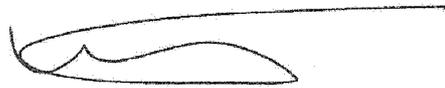
To demonstrate ineffective assistance of counsel, the defendant must show both (1) that defense counsel's representation fell below an objective standard of reasonableness and (2) prejudice. *Strickland* 466 U.S. at 694; *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (reaffirming adherence to the *Strickland* test). Prejudice requires a showing that but for counsel's performance it is reasonably probable that the result would have been different. *State v. Cham*, 165 Wn. App. 438, 267 P.3d 528 (2011); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting *Strickland*, 466 U.S. at 694).

Without Officer Worley's Tait hearsay, the State did not prove Anne Maria Janssen-Tait was a "person, living or dead. CP at 48. Counsel's failure to object to the hearsay fell below the standard of effective defense counsel.

E. CONCLUSION

Mr. Collins' convictions on counts 1, 3, 4, 5, 6, and 14 should be reversed and dismissed for insufficient evidence. The remaining counts should also be dismissed and remanded to the trial court for further actions.

Respectfully submitted on May 7, 2012.



LISA E. TABBUT, WSBA #21344
Attorney for Scott E. Collins

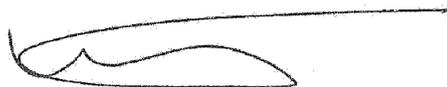
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled via the Court's web filing portal the Brief of Appellant with: (1) Susan I. Baur, Cowlitz County Prosecutor's Office at SasserM@co.cowlitz.wa.us; and (2) the Court of Appeals, Division II; and (3) I mailed it to Scott E. Collins/DOC#918160, Monroe Corrections Center, P.O. Box 777, Monroe, WA 98272.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed May 7, 2012, in Mazama, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Scott E. Collins

COWLITZ COUNTY ASSIGNED COUNSEL

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