

NO. 42714-1-II
Cowlitz Co. Cause NO. 10-1-00860-5

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

SCOTT E. COLLINS,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. SHOULD THE APPELLANT'S CHARGES BE JOINED FOR TRIAL WHEN THE CHARGES ARE BASED ON A SERIES OF ACTS CONNECTED TOGETHER, THE JOINDER OF CHARGES PROMOTES JUDICIAL ECONOMY, AND THE DEFENDANT DOES NOT SUFFER UNDUE PREJUDICE FROM THE JOINDER OF CHARGES?
2. WAS THERE SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE APPELLANT GUILTY OF COUNT 1, BURGLARY IN THE SECOND DEGREE, COUNT 3, MALICIOUS MISCHIEF IN THE SECOND DEGREE, AND COUNT 4, TRAFFICKING IN STOLEN PROPERTY IN THE FIRST DEGREE?
3. WAS THERE SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE APPELLANT GUILTY OF COUNT 5, FINANCIAL FRAUD, COUNT 6, IDENTITY THEFT IN THE SECOND DEGREE, AND COUNT 14, POSSESSION OF STOLEN PROPERTY IN THE THIRD DEGREE?
4. DID THE TRIAL JUDGE CORRECTLY INSTRUCT THE JURY THAT IMPEACHMENT OF A WITNESS WITH HIS PRIOR INCONSISTENT STATEMENTS WAS FOR IMPEACHMENT PURPOSES ONLY?
5. WAS THE APPELLANT PREJUDICED BY HIS ATTORNEY'S DEFICIENT REPRESENTATION?

II. SHORT ANSWERS

1. YES. THE APPELLANT'S CHARGES SHOULD BE JOINED FOR TRIAL WHEN THE CHARGES WERE BASED ON A SERIES OF ACTS CONNECTED TOGETHER, THE JOINDER OF CHARGES PROMOTED JUDICIAL ECONOMY, AND THE DEFENDANT DID NOT SUFFER UNDUE PREJUDICE FROM THE JOINDER OF CHARGES.
2. YES. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE APPELLANT GUILTY OF COUNT 1,

BURGLARY IN THE SECOND DEGREE, COUNT 3, MALICIOUS MISCHIEF IN THE SECOND DEGREE, AND COUNT 4, TRAFFICKING IN STOLEN PROPERTY IN THE FIRST DEGREE.

3. YES. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE APPELLANT GUILTY OF COUNT 5, FINANCIAL FRAUD, COUNT 6, IDENTITY THEFT IN THE SECOND DEGREE, AND COUNT 14, POSSESSION OF STOLEN PROPERTY IN THE THRID DEGREE.
4. YES. THE TRIAL JUDGE CORRECTLY INSTRUCTED THE JURY THAT IMPEACHMENT OF A WITNESS WITH HIS PRIOR INCONSISTENT STATEMENTS WAS FOR IMPEACHMENT PURPOSES ONLY.
5. NO. THE APPELLANT'S ATTORNEY WAS NOT DEFICIENT AND THE APPELLANT WAS NOT PREJUDICED BY HIS ATTORNEY'S REPRESENTATION.

III. FACTS

Rebecca Bateman resided in Castle Rock, Washington State. 4ARP at 397-398. In December 8, 2009, one of her medical providers, Regency Blue Cross/Blue Shield, issued a check to Ms. Bateman for her eyeglasses and sent the check to her home. The check was later reissued because things were missing from her mail box and she never received the first check. Ms. Bateman first became aware of the missing check when Castle Rock Police Officer Charlie Worley notified her that he found a check made out to her in the appellant's trailer. 3RP at 373-377 and 4ARP at 399-400. Ms. Bateman did not know the appellant and the appellant did not have her permission to possess the first check. 4ARP at 400.

Andrew Wheeler resided in Castle Rock, Washington State. 3RP at 367. He had a savings account with Fibre Federal and a bank card to access his account. The bank card was stored in his wallet and subsequently stolen by a former roommate. 3RP at 368-369. Mr. Wheeler did not know the appellant and the appellant did not have his permission to possess the stolen bank card. 3RP at 369. Officer Worley subsequently found Mr. Wheeler's stolen Fibre Federal bank card in the appellant's trailer. 3RP at 373-377.

In February 2010, Jamie Barbosa worked for JC Penny and had her purse stolen from her car. 4ARP at 394-395. One of the stolen items in her purse was her social security card. 4ARP at 395. Ms. Barbosa did not know the appellant and the appellant did not have her permission to possess her social security card. 4ARP at 395-396. Officer Worley subsequently found Ms. Barbosa's stolen social security card in the appellant's trailer. 3RP at 373-377.

Around August 28, 2010, Jesse Allman had his Washington Driver's License stolen in Kalama, Washington State. 3RP at 298 and 310-311. Mr. Allman did not know the appellant and the appellant did not have his permission to possess his Washington Driver's License. 3RP at 311. Cowlitz County Deputy Jordan Spencer subsequently found Mr.

Allman's stolen Washington Driver's License in the appellant's trailer. 3RP at 298.

Helen Hill and Thomas Hill resided in Kalama, Washington State. 3RP at 288-289. Around August 28, 2010, somebody burglarized their home and stole several documents. The stolen documents included Geico insurance cards and a letter for Mr. Hill. 3RP at 289-290. The Hills did not know the appellant and the appellant did not have the Hills' permission to possess their stolen paperwork. 3RP at 289-290. Officer Worley subsequently found the Hills' stolen Geico insurance cards and a letter for Mr. Hill in the appellant's trailer. 3RP at 373-377.

In August 2010, Lower Columbia CAP was building eight houses in Castle Rock, Washington State. 4ARP at 403. Ronald Philpott was the construction supervisor and Peter Rafn subcontracted to do the electrical installations for the houses. 4ARP at 402 and 414-415. Lower Columbia CAP, Mr. Philpott, and Mr. Rafn did not give the appellant permission to be in any of the CAP houses and to possess CAP properties. 4ARP at 413 and 427.

A couple of days prior to August 28, 2010, Mr. Rafn noticed a suspicious old 70's red pickup with an open bed driving slowly several times by the CAP housing development. The pickup was occupied by two unknown men. 4ARP at 427-429 and 431. The truck was suspicious

because the driver drove extremely slow and stopped to look and search in more detail than a regular passerby. 4ARP at 428-429.

On August 27, 2010, at about 8 PM, Mr. Rafn completed all the rough wiring in the CAP house located at 195 Schier Street, Castle Rock, Washington. 3RP at 326 and 4ARP at 415-416. Mr. Rafn used non-metallic wires of several different gauges to wire the house. The wires included fourteen gauge wires, twelve gauge wires, ten gauge wires, and six gauge wires. Most of the wires used on the lower half of the house involved fourteen gauge and twelve gauge wires. 4ARP at 416-418 and 432. The house was near completion, secured, and resembled any other house. It had plumbing, wires, a roof, doors, windows, locks, and walls. 4ARP at 404-406.

On August 28, 2010, at about 3 AM, Castle Rock Police Officer Jeff Gann responded to a party complaint in the 100 block of Shintaffer Street in Castle Rock, Washington. During that call, Officer Gann witnessed the appellant drive by his location in an old early 70's red Dodge pickup with an open bed. The appellant was close to and about two minutes, at a speed of twenty five miles per hour, away from the location of the CAP houses. 3RP at 322-326.

On August 28, 2010, at about 6:15 AM, Mr. Philpott received a call about water spraying out of the CAP house located at 195 Schier

Street, Castle Rock, Washington. Mr. Philpott did not suspect anything was wrong with house and did not check on it until 7:15 AM. 3RP at 326 and 4ARP at 404-406. When he arrived at the house, Mr. Philpott discovered there was a cut to the cooper valve next to the kitchen sink that caused water to spray everywhere, there were wires stripped and stolen from the house, and there was a missing \$150 dollar green Hitachi two horse powered air compressor. The stolen air compressor had an engraving to indicate that it belonged to Lower Columbia CAP. 3RP at 327-329 and 4ARP at 404-406 and 408-411.

The house had 100 percent wire damage to its lower half and 30 percent wire damage to its upper half. Chunks of wires, totaling about 1000 feet, were removed from the house. 4ARP at 406-408 and 418-420. The cost to replace the stolen wires was approximately \$1400. 4ARP at 422-423. The total cost to replace the stolen wires and rewire the house was approximately \$2650. 4ARP at 423.

On August 28, 2010, at about 8 AM, Officer Gann contacted Mr. Philpott about the burglary to the CAP house. 3RP at 326. Mr. Philpott informed Officer Gann of the missing wires and air compressor. Officer Gann noticed damages to the wirings throughout the house and the missing wires predominately had yellow and white wire casings. 3RP at 327-329.

On August 28, 2010, at about 5 PM, Officer Gann received information that caused him to locate and stop an old 70's red Dodge pickup. Officer Gann was eastbound on Tower Road when he saw the pickup heading westbound and going past him. The pickup initially appeared to be going the speed limit of 35 miles per hour. Upon passing Officer Gann, the pickup accelerated quickly and reached about 70 miles per hour. 3RP at 329-331. Officer Gann stopped the pickup and its occupants in Cowlitz County, Washington State. The appellant was the driver of the pickup and the three passengers were Charles Reynolds, Brandon Montreal, and Aliesha Allen. 3RP at 331-334 and 347.

The pickup had an open bed and in the open bed, Officer Gann noticed a green Hitachi air compressor of the same color and make as the stolen CAP air compressor. 3RP at 332. Appellant admitted to knowing the compressor was in open bed of the pickup. 3RP at 365. After the compressor was confirmed to be the stolen CAP air compressor, Officer Gann arrested the appellant for possessing stolen property. 3RP at 334-335 and 371-372. The compressor was seized and later returned to Lower Columbia CAP. The engraving on the stolen air compressor to indicate that it belonged to Lower Columbia CAP had been scratched off. 3RP at 348 and 372 and 4ARP at 409-411.

Also in the open bed of the pickup, Officer Gann noticed and seized a camouflage backpack filled with bare cooper wires. The bare cooper wires had all its casings removed and were chunks wadded up into balls. Bare cooper wires only monetary value was as scrap metal. 3RP at 345-346. The bare cooper wires inside the backpack consisted of three different gauges. The smallest wire gauge totaled approximately 948 feet in length. The middle wire gauge totaled approximately 258.5 feet in length. The largest wire gauge totaled approximately 105 feet in length. 3RP at 382-385. Mr. Rafn later examined the bare cooper wires and confirmed the bare cooper wires were of fourteen, twelve, and ten gauges. Most of the bare cooper wires consisted of fourteen and twelve gauges. Most of the wires stolen from the CAP house were of fourteen and twelve gauges. 4ARP at 432 and 434.

On August 28, 2010, at about 5:30 PM, Norma Collins came to the scene of the appellant's arrest to retrieve the pickup. 3RP at 336. Ms. Collins is the appellant's step-mother. 3RP at 314. Ms. Collins resided with her husband, Jim Collins, at 6231 Westside Highway in Castle Rock, Washington. 3RP at 292-294, 297, and 313-314. The old 70's red Dodge pickup with an open bed belonged to Jim Collins. 3RP at 315-317 and 371.

On August 28, 2010, at about 6:30 PM, Officer Gann, Deputy Spencer, and Deputy Kelly Pattison went to Norma Collins' residence. Norma and Jim Collins showed the officers around their property and led them to the appellant's fifth wheel trailer where the appellant had been living on their property for the past three months. Outside the trailer, Officer Gann and deputies noticed pieces of wire casings of the same color and size as the stolen CAP wires. 3RP at 292-294, 297, 302-303, 307, 317-319, 321, and 336-339.

On August 28, 2010, at about 9:30 PM, Officer Gann, Officer Worley, Deputy Spencer, and Deputy Pattison searched the appellant's trailer pursuant to a search warrant. 3RP at 295, 302, 305, 339, 371, and 373. The trailer was approximately thirty feet in length and had a bathroom towards the back, a kitchen in the middle, and a bedroom towards the front and above the hitch. 3RP at 303. The floor of the trailer was covered with pieces of wire casings and pieces of wires with casings resembling the stolen CAP wires. 3RP at 299, 303, 307, and 341-344.

In the appellant's trailer, Deputy Pattison found two pairs of bolt cutters and Officer Gann found a large garbage bag filled with pieces of wire casings. The wire casings were of the same color and type as the stolen CAP wires. 3RP at 303-305 and 342-343. Mr. Rafn later examined the wire casings from the large garbage bag and confirmed that the wire

casings from the garbage bag matched the wire casings from the stolen CAP wires. 4ARP at 423-427.

During the search, Deputy Spencer found three Texas Driver's Licenses in a kitchen cupboard. Two of the Texas Driver's Licenses were for the appellant, numbered 04360957, and had the appellant's picture and name. One of the Texas Driver's Licenses was forged, numbered 22145811, and had the appellant's picture and the name of Patrick Kent. 3RP at 295-297, 301, and 319. In the same cupboard, Deputy Spencer also found Jesse Allman's stolen Washington Driver's License. 3RP at 298 and 310-311.

Officer Worley searched a drawer to the right of the kitchen and found two pairs of wire strippers and documents for several different people. The documents found included (1) a social security card for Patrick Kent, (2) a social security card for Jacquelyn Harris, (3) a social security card for Jamie Barbosa, (4) a social security card for Anne Maria Jensen, (5) a California Driver's License for Anne Marie Jensen Tate, (6) a checkbook for Carl Tate and Mia Maria Jensen Tate, (7) a Regency Blue Cross/Blue Shield check for Rebecca Bateman, (8) two Department of Social and Health Services checks for Alvin Minor, (9) a Fibre Federal bank card for Andrew Wheeler, and (10) Geico Insurance Policy cards and a letter for Helen and Thomas Hill. 3RP at 373-377 and 379-380. Officer

Worley subsequently attempted to contact the people identified in the recovered documents and was able to contact Carl and Anne Marie Jensen Tate, Helen Hill, and Rebecca Bateman. 3RP at 377.

The State initially charged the appellant with count 1, burglary in the second degree, count 2, theft in the second degree, count 3, malicious mischief in the second degree, and count 4, trafficking in stolen property in the first degree, for the events relating to August 28, 2010. CP 1-3. The State later amended the information to add count 5, financial fraud, counts 6 to 11, identity theft in the second degree, count 12, forgery, and counts 13 to 15, possession of stolen property in the third degree. CP 4-9. Prior to the jury trial, the State filed a second amended information reducing count 7, identity theft in the second degree, to possession of stolen property in the third degree. CP 46-51 and 3RP 274-275.

Prior to trial, the appellant moved to sever counts 1 to 4 from counts 5 to 15. The Honorable Jim Stonier of the Cowlitz County Superior Court denied the appellant's severance motion. 3RP at 269-270. The appellant twice renewed his severance motion before the trial judge, the Honorable Stephen Warning of the Cowlitz County Superior Court. Judge Warning denied the appellant's renewed severance motion and dismissed counts 10 and 11 upon appellant's motion to dismiss. 3RP at 280-281 and 4BRP at 436-445 and 505.

During his jury trial, the appellant did not testify and called Charlie Reynolds as his only witness. Mr. Reynolds testified that he and he alone burglarized the CAP house and stole the wires and air compressor. 4BRP at 448-484. Immediately after stealing the wires and compressor, Mr. Reynolds called the appellant for a ride. 4BRP at 450 and 454. When the appellant arrived around midnight, Mr. Reynolds loaded the stolen wires and air compressor into the open bed of the appellant's 70's red Dodge pickup. 4BRP at 452. They proceeded to go to the appellant's trailer where Mr. Reynolds spent several hours removing the casings from the stolen wires. Mr. Reynolds intent was to sell the bare cooper wires as scrap metal. Mr. Reynolds testified that he did everything himself and did not do anything to remove the engraving on the air compressor that indicated it belonged to Lower Columbia CAP. 4BRP at 455-457, 464, and 466-467. Mr. Reynolds denied making any prior statements that implicated the appellant. 4BRP at 458-459, 470-473, 476-479, and 483.

Mr. Reynolds' trial testimony conflicted with his prior statements to Judge Stonier and Officer Gann. The State sought to impeach Mr. Reynolds with an audio recording of his prior statement to Judge Stonier indicating that he worked with the appellant to steal wires and an air compressor from the Lower Columbia CAP house. 4BRP at 445-447 and 490-498. The appellant objected to the audio recording being admitted for

substantive purposes and requested a limiting instruction. 4BRP at 498-499. The trial judge gave a limiting instruction per the appellant's request. The appellant had no objection to the trial judge's proposed limiting instruction. 4BRP at 499-500.

Prior to the audio being played for the jury, the trial court instructed the jury that "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. The voices you are going to hear are those of Mr. Reynolds, Mr. Hanify, who was Mr. Reynolds' attorney and Mr. Nguyen, the prosecutor who each are pretty obvious as you are listening. Again, this is being offered for purposes of impeachment and what weight, if any, you choose to give to Mr. Reynolds' testimony." 4BRP at 509.

The State also called Officer Gann to impeach Mr. Reynolds with his prior conflicting statements. When Officer Gann first stopped the pickup, Mr. Reynolds told Officer Gann that the air compressor belonged to the appellant and was in the pickup prior to him being picked up by the appellant. 4BRP at 507-508. On August 29, 2010, Mr. Reynolds indicated to Officer Gann that the appellant sped up after driving past Officer Gann because the appellant had stolen stuff in the truck and did not

want to get stopped. Mr. Reynolds also indicated that the appellant stripped the stolen wires of their casings in the appellant's trailer. 4BRP at 508.

Prior to closing arguments, the trial judge instructed the jury that “[a] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.” 4BRP at 520. The jury found the appellant guilty of all counts except count 10 and count 11 which were dismissed by the trial judge. CP 106-109, 111-112, 114, 116, 118-121, and 160. Appellant was sentenced to 84 months in prison. CP 130. Appellant now appeals his guilty verdicts. CP 139-156.

IV. ARGUMENTS

1. **THE APPELLANT'S CHARGES WERE CORRECTLY JOINED FOR TRIAL BECAUSE THE CHARGES WERE BASED ON A SERIES OF ACTS CONNECTED TOGETHER, THE JOINDER OF CHARGES PROMOTED JUDICIAL ECONOMY, AND THE DEFENDANT DID NOT SUFFER UNDUE PREJUDICE FROM THE JOINDER OF CHARGES.**

“CrR 4.3(a) permits two or more offenses of similar character to be joined in one trial. Offenses properly joined under CrR 4.3(a), however, may be severed if ‘the court determines that severance will promote a fair determination of the defendant’s guilt or innocence of each offense.’ CrR 4.4(b). The failure of the trial court to sever counts is

reversible only upon showing that the court's decision was a manifest abuse of discretion." State v. Brythrow, 114 Wash.2d 713, 717-718 (1990). "Defendants seeking severance must not only establish that prejudicial effects of joinder have been produced, but they must also demonstrate that a joint trial would be so prejudicial as to outweigh concern for judicial economy." Id. at 722.

Pursuant to CrR 4.3(a), "two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both: (1) Are of the same or similar character, even if not part of a single scheme or plan; or (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." Crimes of the same character or nature may be joined even though they were not committed at or near the same time. State v. Townson, 29 Wn.App. 430, 432 (1981). Joinder is also permitted when the offenses are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. State v. Lee, 132 Wa.2d 498, 503-504 (1997).

The rule for joinder should be construed expansively to promote the public policy of conserving judicial and prosecution resources. State v. Bryant, 89 Wn. App. 857, 867 (1998). In any given case, the court must weigh any prejudice to the defendant that would be caused by the joinder

against the important considerations of economy and expedition in judicial administration. State v. Canedo-Astorga, 79 Wn.App. 518, 527 (1996). Factors that courts need to consider in determining whether severance is required include (1) the strength of the State's evidence on each count, (2) the clarity of defenses as to each count, (3) whether the trial court properly instructed the jury to consider the evidence of each crime, and (4) the admissibility of evidence of the other crimes. State v. Warren, 55 Wn.App. 645, 655 (1989). The lack of one of these factors alone does not require severance of charges. Id. at 654-655.

The defendant's argument that the trial court denied him a fair trial by refusing to sever the charges is not convincing. In State v. Kalakosky, 121 Wn.2d 525 (1993), the court found that severance was not appropriate where the defendant was charged with raping five different women in five separate and dissimilar incidents. Id. at 537. In Brythow, the court found severance was not required where the defendant was charged with two different robberies, not part of a common modus operandi, over the course of a month. 114 Wn.2d at 717-723. In State v. Easterbrook, 58 Wn.App. 805 (1990), the court found severance was not appropriate where the defendant was charged with the burglary and rape of one woman and another separate burglary with sexual connotations that occurred a month later and involved a different victim. Id. at 810-815.

The charges in this case should not be severed because (1) the charges are based on a series of acts connected together, (2) joinder of the charges promotes judicial economy, and (3) the defendant does not suffer undue prejudice from the joinder of charges. On August 28, 2010, Officer Gann's investigation of the CAP burglary led to the appellant's arrest, search of the appellant's trailer, and seizure of evidence pertaining to all the charges in this case. The events on August 28, 2010, pertained to the appellant and involved the same date, same officers, and same series of events. Joinder was appropriate to promote judicial economy because it avoided presenting the same evidence and calling the same witnesses in multiple trials.

Furthermore, joinder of the charges did not cause additional prejudice to the defendant because the trial judge properly instructed the jury to consider each charge separately and evidence of the different charges would have been cross admissible under ER 404(b) had the charges been separated for trial. Pursuant to ER 404(b), "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show [that he acted] in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." State v. Lillard, 122 Wash.App. 422, 431 (2004).

“In addition to the non-exhaustive list of exceptions identified in ER 404(b) itself, our Supreme Court has recognized a res gestae or ‘same transaction’ exception to the rule.” State v. Hughes, 118 Wash.App. 713, 724-725 (2003). “Where another offense constitutes a ‘link in the chain’ of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible ‘in order that a complete picture be depicted for the jury.’” Id. at 725. “A defendant cannot insulate himself by committing a string of connected offenses and then argue that the evidence of the other uncharged crimes is inadmissible because it shows the defendant’s bad character, thus forcing the State to present a fragmented version of the events. Under the res gestae or ‘same transaction’ exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime.” 122 Wash.App. at 431-432.

In the present case, Officer Gann’s investigation of the CAP burglary led officers to search the appellant’s trailer. The appellant was in jail at the time of the search and evidence connecting the appellant to the trailer was needed to connect the appellant to evidence seized in the trailer. Inside the trailer, officers found and seized (1) a trash bag full of wire casings, (2) pieces of wire casings and wires with casings, (3) 2 bolt

cutters, (4) 2 wire stripping pliers, and (5) various documents for the appellant and other individuals.

The documents for the appellant included three Texas Driver's Licenses, two of the licenses bore the appellant's picture and name, and one bore the appellant's picture and Patrick Kent's name. The documents found by the officers pertaining to other people included (1) social security cards for Patrick Kent, Jacques Harris, Jamie Barbosa, and Anne Janssen-Tait, (2) Driver's Licenses for Jesse Allman and Anne Janssen-Tait, (3) a checkbook for Karl Tait and Mia Janssen-Tait, (4) insurance cards and a letter for Helen and Thomas Hill, (5) checks for Rebecca Bateman and Avin Minor, and (6) a bank card for Andrew Wheeler.

The three Texas Driver's Licenses with the appellant's picture were needed to connect the appellant to the trailer as it confirmed his dominion, control, and ownership of the trailer. The forged Texas Driver's License with the appellant's picture and Patrick Kent's name, and Patrick Kent's social security card was relevant to establish his motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident with regards to items found in the trailer. Therefore, joinder of the charges was appropriate because it promoted judicial economy and did not cause any additional prejudice to the defendant.

2. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE APPELLANT GUILTY OF COUNT 1, BURGLARY IN THE SECOND DEGREE, COUNT 3, MALICIOUS MISCHIEF IN THE SECOND DEGREE, AND COUNT 4, TRAFFICKING IN STOLEN PROPERTY IN THE FIRST DEGREE.

“The standard for determining whether a conviction rests on insufficient evidence is ‘whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ In re Matter Martinez, 171 Wash.2d 354, 364, (2011). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Id. “This standard is a deferential one, and questions of credibility, persuasiveness, and conflicting testimony must be left to the jury.” Id. There was sufficient evidence for the jury to find the appellant guilty of count 1, burglary in the second degree, count 3, malicious mischief in the second degree, and count 4, trafficking in stolen property in the first degree.

A couple of days prior to August 28, 2010, Mr. Rafn noticed a suspicious old 70’s red pickup with an open bed driving slowly several times by the CAP housing development. The pickup was occupied by two unknown men. The truck was suspicious because the driver drove

extremely slow and stopped to look and search in more detail than a regular passerby.

On August 28, 2010, at about 3 AM, Officer Gann witnessed the appellant drive an old early 70's red Dodge pickup with an open bed two minutes, at a speed of twenty five miles per hour, away from the location of the CAP houses. Sometime early that morning, someone burglarized the CAP house, stripped wires from the CAP house, stole an air compressor, caused more than \$750 damages to the burglarized CAP house, immediately transported the stolen items to the appellant's trailer, and removed the casings from the stolen wires and the engraving on the stolen air compressor inside the appellant's trailer. Bare cooper wire's only monetary value is for sale as scrap metal.

The appellant's own witness, Mr. Reynolds, placed the appellant at the scene of the crimes as the appellant transported the stolen items to his trailer immediately after the burglary and was present in the trailer when someone removed the casings from the stolen wires and the engraving on the air compressor. Mr. Reynolds claimed he acted alone and did not remove the engraving on the air compressor. When officers recovered the air compressor, the engraving on the air compressor indicating it belonged to CAP had been scratched off. Mr. Reynolds admitted that removing

casings from the stolen wires was for the purpose of selling the bare cooper wires as scrap metal.

At about 5 PM, Officer Gann located an old 70's red Dodge pickup with an open bed on Tower Road. The pickup accelerated quickly and went twice the speed limit upon immediately passing Officer Gann. The appellant was the driver and inside the pickup's open bed, officers recovered the stolen air compressor and stolen wires. The wires were stripped of their casings and rolled into balls of bare cooper wires.

At about 9:30 PM, Officer Gann, Officer Worley, Deputy Spencer, and Deputy Pattison searched the appellant's trailer. The floor of the appellant's trailer was covered with wire casings and pieces of wires stolen from the CAP house. Inside the trailer, officers and deputies found two pairs of bolt cutters, a large garbage bag filled with wire casings from the stolen CAP wires, and two pairs of wire strippers.

In the light most favorable to the State, the jury could reasonably infer that the appellant scouted out the CAP houses a few days prior to the burglary because the appellant's parents own an old 70's red pickup with an open bed and the appellant drove the pickup immediately before and after the burglary. The appellant's personal involvement in the burglary, the theft of wires, and the acts to stripe the wires for sale as scrape metal can reasonably be inferred from testimony indicating that the appellant

transported the stolen wires and air compressor to his trailer immediately after the burglary, the appellant quickly accelerated and drove at a high speed to get away from Officer Gann on Tower Road, the stolen wires and air compressor were recovered from the appellant's pickup hours after the burglary, two bolt cutters and two wire strippers were recovered from inside the appellant's trailer, and the stolen wires were stripped for sale as scrap metal inside the appellant's trailer shortly after the burglary. The jury correctly found the appellant guilty of count 1, burglary in the second degree, count 3, malicious mischief in the second degree, and count 4, trafficking in stolen property in the first degree.

3. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE APPELLANT GUILTY OF COUNT 5, FINANCIAL FRAUD, COUNT 6, IDENTITY THEFT IN THE SECOND DEGREE, AND COUNT 14, POSSESSION OF STOLEN PROPERTY IN THE THRID DEGREE.

For similar reasons as indicated above with regards to count 1, count 3, and count 4, there was sufficient evidence for the jury to find the appellant guilty of count 5, financial fraud, count 6, identity theft in the second degree, and count 14, possession of stolen property in the third degree.

On August 28, 2010, at about 9:30 PM, officers and deputies searched the appellant's trailer pursuant to a search warrant. In a kitchen

cupboard, Deputy Spencer found three Texas Driver's Licenses. Two of the Texas Driver's Licenses were for the appellant, numbered 04360957, and had the appellant's picture and name. One of the Texas Driver's Licenses was forged, numbered 22145811, and had the appellant's picture and Patrick Kent's name. In the same cupboard, Deputy Spencer also found Jesse Allman's stolen Washington Driver's License.

In a drawer to the right of the kitchen, Officer Worley found documents for several different people. The documents found included (1) a social security card for Patrick Kent, (2) a social security card for Jacquelyn Harris, (3) a social security card for Jamie Barbosa, (4) a social security card for Anne Maria Jensen, (5) a California Driver's License for Anne Marie Jensen Tate, (6) a checkbook for Carl Tate and Mia Maria Jensen Tate, (7) a Regency Blue Cross/Blue Shield check for Rebecca Bateman, (8) two Department of Social and Health Services checks for Alvin Minor, (9) a Fibre Federal account number card for Andrew Wheeler, and (10) Geico Insurance Policy cards and a letter for Helen and Thomas Hill.

Mr. Allman, Ms. Barbosa, Ms. Bateman, Mr. Wheeler, and Ms. Hill testified against the appellant and indicated that they had their documents stolen, did not know the appellant, and did not give the appellant permission to possess their stolen documents. Officer Worley

was able to contact Carl Tate and Anne Tate about the recovery of their checkbook, her California Driver's License, and her social security card from the appellant's trailer. The Tates were unable to testify against the appellant as they were on their European vacation. Officer Worley had no contact Mr. Minor concerning the recovery of his two DSHS checks from the appellant's trailer.

In the light most favorable to the State, the jury could reasonably infer that the appellant possessed the documents belonging to the Tates and Mr. Minor without their permission due to the nature of the documents recovered, the volume of the documents recovered, and evidence of the appellant's intent to use those documents for an unlawful purpose. Due to the personal information attached to Ms. Tate's California Driver's License and social security card, it is reasonable to infer that the appellant possessed those documents without her permission. Due to the financial implications attached to Mr. Tate's checkbook, it is reasonable to infer that the appellant possessed Mr. Tate's checkbook without his consent. Due to the monetary value attached with Mr. Minor's two DSHS checks, it is reasonable to infer that the appellant possessed the DSHS checks without Mr. Minor's consent. The two checks were made out to Mr. Minor only and the appellant's possession of those checks deprived Mr. Minor of the funds authorized by those checks.

The reasonable inference that the appellant unlawfully possessed the documents belonging to the Tates and Mr. Minor was further solidified by the other like documents recovered from the appellant's trailer without their owner's consent. Ms. Barbosa and Mr. Allman did not consent to the appellant's possession of her social security card and his Washington Driver's License due to the personal information attached with those documents. Mr. Wheeler did not consent to the appellant's possession of his bank card due to the financial implications attached with his bank card. Ms. Bateman did not consent to the appellant's possession of her Regency Blue Cross/Blue Shield check due to the monetary value attached to the check.

Moreover, the appellant's unlawful possession of the documents belonging to the Tates and Mr. Minor was evidenced by the discovery of the three Texas Driver's Licenses and Patrick Kent's social security card inside the appellant's trailer. Two of the Texas Driver's Licenses were for the appellant and accurately bore the appellant's photo and name. One of the Texas Driver's Licenses was forged with the appellant's photo and Patrick Kent's name. The forged Texas Driver's License evidenced the appellant's intent to use all the documents for an unlawful purpose. Therefore, it was reasonable for the jury to infer the appellant unlawfully possessed documents for the Tates and Mr. Minor for some unlawful

purpose. The jury correctly found the appellant guilty of count 5, financial fraud, count 6, identity theft in the second degree, and count 14, possession of stolen property in the third degree.

4. THE TRIAL JUDGE CORRECTLY INSTRUCTED THE JURY THAT IMPEACHMENT OF A WITNESS WITH HIS PRIOR INCONSISTENT STATEMENTS WAS FOR IMPEACHMENT PURPOSES ONLY.

“The admissibility of evidence offered to impeach the credibility of a witness is governed by ER 607, which provides that ‘[t]he credibility of a witness may be attacked by any party, including the party calling [the witness].’” State v. Lavaris, 106 Wn.2d 340, 344 (1986). “In general, a witness’s prior statement is admissible for impeachment purposes if it is inconsistent with the witness’s trial testimony.” State v. Newbern, 95 Wn.App. 277, 292 (1999). Impeachment evidence affects a witness’s credibility and is not proof of the substantive facts encompassing in such evidence. When such evidence is admitted, an instruction cautioning the jury to limit its consideration of the statement to its intended purpose is both proper and necessary. State v. Johnson, 40 Wn.App. 371, 377 (1985).

In the present case, Mr. Reynolds testified for the appellant and indicated that he acted alone in burglarizing the CAP house and stealing the wires. Mr. Reynolds’ trial testimony conflicted with his prior

statements to Judge Stonier. The trial judge correctly allowed Mr. Reynolds to be impeached with his prior inconsistent statement to Judge Stonier and correctly instructed the jury that “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. The voices you are going to hear are those of Mr. Reynolds, Mr. Hanify, who was Mr. Reynolds’ attorney and Mr. Nguyen, the prosecutor who each are pretty obvious as you are listening. Again, this is being offered for purposes of impeachment and what weight, if any, you choose to give to Mr. Reynolds’ testimony.” 4BRP at 509. The appellant requested and did not object to the trial court’s limiting instruction. Therefore, the appellant waives appellate review with regards to the limiting instruction as he requested the instruction and the limiting instruction correctly stated the law.

5. THE APPELLANT’S ATTORNEY WAS NOT DEFICIENT AND THE APPELLANT WAS NOT PREJUDICED BY HIS ATTORNEY’S REPRESENTATION.

The state and federal constitutions guarantee a defendant the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 693 (1984) and State v. McFarland, 127 Wash.2d 322, 335 (1995). An appellant must show both deficient performance and resulting

prejudice to prevail in an ineffective assistance claim. State v. McNeal, 145 Wash.2d 352, 362 (2002). To establish deficient performance, an appellant must show that his attorney's performance fell below an objective standard of reasonableness. Id. To establish prejudice, an appellant must demonstrate that, but for the deficient representation, the outcome of the trial would have differed. Id.

Deference will be given to counsel's performance in order to “eliminate the distorting effects of hindsight” and the reviewing appellate court must indulge in a strong presumption that counsel’s performance is within the broad range of reasonable professional assistance. 466 U.S. at 689 and State v. Lopez, 107 Wash.App. 270, 275 (2001). A decision concerning trial strategy or tactics will not establish deficient performance. State v. Hendrickson, 129 Wash.2d 61, 77-78 (1996), State v. Garrett, 124 Wash.2d 504, 520 (1994), and 127 Wash.2d at 335.

In the present case, the appellant’s counsel was not deficient and the appellant was not prejudiced by his attorney’s representation. Prior to trial, the appellant’s attorney tried unsuccessfully to sever the charges to improve the appellant’s chances at trial. During the trial, the appellant’s attorney successfully moved to dismiss two of the State’s charges. When the appellant’s sole witness was about to be impeached with his prior inconsistent statements that implicated the appellant in the burglary and

theft of wires, the appellant's attorney correctly asked for limiting instructions to preclude the State from using those statements for substantive purposes.

The appellant now claims his attorney was ineffective for failing to object to Officer Worley's testimony that he reached the Tates by phone and that the Tates were on an extended European vacation. The appellant's argument that Officer Worley's testimony concerning the Tates was inadmissible hearsay is not persuasive.

"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). Officer Worley's testimony regarding the Tates did not call for inadmissible hearsay. In State v. Thomas, 150 Wash.2d 821 (2004), the defendant was charged with murder and claimed that the crime was committed by a third person, Lynch. In Thomas, an officer was properly allowed to testify that the police had contacted certain people regarding Lynch's possible involvement and that as a result of these discussions, the police concluded that Lynch had a valid alibi. The Supreme Court held that the officer's testimony was not objectionable as hearsay because the officer did not actually quote out-of-court statements by others. Id. at 863.

Like the officer in Thomas, Officer Worley documented his investigation and contact with the Tates. At no time did Officer Worley testify to any inadmissible hearsay pertaining to the contents of his conversation with the Tates or what the Tates told him regarding the discovery of their checkbook and Ms. Tate's California Driver's License and social security card. The appellant's attorney correctly did not try to suppress Officer Worley's testimony regarding the Tates and was not ineffective in representing the appellant. The appellant was not prejudiced by his attorney and received effective legal representation.

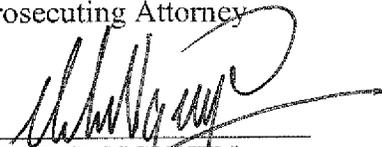
V. CONCLUSION

The appellant's convictions should be affirmed because his charges were correctly joined for trial, there was sufficient evidence for the jury to find the appellant guilty of all charges, the trial court correctly instructed the jury about the impeachment of a witness with his prior inconsistent statements, and the appellant received effective legal representation.

Respectfully submitted this 9 day of August, 2012.

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By:


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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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

Signed at Kelso, Washington on August ^{9th}____, 2012.


Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

August 09, 2012 - 3:12 PM

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