

No. 42924-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

MANOA MOTULIKI,

Appellant.

---

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

---

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State did not prove beyond a reasonable doubt that Mr. Manoa Motuliki committed residential burglary.

2. The State did not prove beyond a reasonable doubt that Mr. Motuliki possessed a stolen motor vehicle.

3. Mr. Motuliki did not receive effective assistance of counsel.

4. The trial court erred by ordering Mr. Motuliki to pay a \$1,200 "jury per diem" fee.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. Manoa Motuliki was convicted of residential burglary, but the State did not establish beyond a reasonable doubt that Mr. Motuliki entered the house or that the house, which was not occupied, was a dwelling. Viewing the evidence in the light most favorable to the State, must Mr. Motuliki's conviction for residential burglary be dismissed ?

2. Mr. Motuliki was convicted of possession of a stolen motor vehicle, but the State only produced evidence that items belonging to him were found in the vehicle. Mr. Motuliki testified that a man gave

him a ride in the truck and took his cell phone. Viewing the evidence in the light most favorable to the State, must Mr. Motuliki's conviction for possessing a stolen motor vehicle be dismissed?

3. The accused has the constitutional right to effective assistance of counsel at trial, and defense counsel is responsible for investigating the facts and law of the case. U.S. Const. amends. VI, XIV; Const. art. I § 22. ER 609 permits the State to impeach a defendant's credibility with prior crimes of dishonesty, and competent defense counsel asks for an instruction explaining the limited purpose of the evidence and ameliorates some of the damage by admitting the prior conviction on direct examination. Mr. Motuliki's attorney did not admit his prior conviction for third degree theft on direct examination and did not offer a limiting instruction after the State questioned Mr. Motuliki about the conviction and admitted a certified copy of his guilty plea. Where the jury was therefore allowed to use Mr. Motuliki's prior theft conviction as propensity evidence to his counsel's deficient performance, must Mr. Motuliki's convictions be reversed because of the violation of his constitutional right to effective assistance of counsel?

4. The superior court's sentencing authority is purely statutory. RCW 10.01.160(2) permits the court to order a convicted defendant to pay a jury fee, but the defendant cannot be ordered to pay for the expenses inherent in providing a constitutionally-guaranteed jury trial. Did the sentencing court exceed its statutory authority by ordering Mr. Motuliki to pay a "jury per diem" fee of \$1,200 in addition to a separate jury demand fee because he exercised his constitutional right to a trial?

C. STATEMENT OF THE CASE

Hazel Dell resident Walter Raschke noticed someone drive a white pickup truck into the driveway of a nearby house, get out, approach the front door, and then go to the side of the garage and attempt to kick out a window. 1aRP 40-41, 43-44, 46. The owner of the house was deceased, so Mr. Raschke called the owner's sister and then 911 at her request. 1aRP 42- 43; 2RP 129, 132-33. Meanwhile, the man returned to the truck and drove away. 1aRP 45. He returned a few minutes later on foot and climbed over a fence on the west side of the house and out of Mr. Raschke's view as he talked to the 911 dispatcher. 1aRP 47, 53-54.

Clark County Sheriff's deputies soon arrived. 1aRP 48, 55, 113. Deputy Andrew Kennison entered the back yard from the west and, from 40 to 50 feet away, very briefly saw a man leave the back of the house through a sliding glass door. 1aRP 70, 75. The deputy directed the man to stop, but he ran the other way, jumped a fence on the east side of the property, and continued down the street. 1aRP 71-72. The deputy was about a block behind the man, and lost sight of him when he cut into a yard. 1aRP 73.

The police did not find anyone inside the house. 1bRP 119. Deputy Joe Swanson found a window frame inside the house and later lifted one latent fingerprints from the frame and three from the glass. 1bRP 140-41, 150-51, 154. A crime laboratory employee opined that two of the prints matched prints of Mr. Motuliki's right thumb and middle finger. 1bRP 187.

When he first arrived at the house, Deputy Kennison had seen a Nissan compact truck parked about 20 yards away and noted the hood was warm. 1aRP 69, 77, 84. Inside the officers found a manila envelope, a black jacket and athletic bags containing various items including clothing, video games, and personal papers. 1aRP 77, 84,

89-90. Mr. Motuliki's cellular telephone was inside a pocket of the jacket. 1aRP 92-93; 1bRP 203; 2RP 214-15, 217.

Benjamin Galloway owned the Nissan truck and had reported it stolen on June 12 after he parked it near a Vancouver bar. 1aRP 58-59. He said the truck contained his tools rather than the items the police discovered. 1aRP 62.

The Clark County Prosecuting Attorney charged Mr. Motuliki with one count of residential burglary and one count of possession of a stolen motor vehicle. CP 1. At a jury trial before the Honorable Richard Melnick, Mr. Motuliki explained that he did not commit the crimes.

Mr. Motuliki was living in Hazel Dell in June 2011 and did not have a car. 2RP 222. On the morning of June 29, Mr. Motuliki's friend Reann picked him up because he had asked for a ride to his friend Vicky's house. 2RP 223-25. Reann was accompanied by a man named George, and she dropped George and Mr. Motuliki at George's truck so that George could take Mr. Motuliki to his destination. 2RP 224-26. Mr. Motuliki had never met George before and did not know his last name. 2RP 226.

George put a bag in his truck and showed Mr. Motuliki video games in the bag. 2RP 228. He then drove the truck to the Hazel Dell house, which he said was his house, parked in the driveway, and told Mr. Motuliki to come with him to the side of the house. 2RP 229. Mr. Motuliki accompanied George into the back yard where he saw George attempt to open a sliding glass door. 2RP 229. Mr. Motuliki looked through a window into the house, but did not enter it. 2RP 230-31. He returned to the truck and waited for George. 2RP 231. After about five minutes, he went to find George, who was trying to open the garage door. 2RP 231.

Mr. Motuliki told George that he needed to go, and George drove Mr. Motuliki to Vicky's house. 2RP 213. While Mr. Motuliki went to find Vicky, he allowed George to use his telephone. 2RP 231-32. Vicky was not home, however, and when Mr. Motuliki returned, George and his truck were gone. 2RP 233. The State impeached Mr. Motuliki with a prior conviction for third degree theft. 2RP 238-40; Ex. 26.

The jury convicted Mr. Motuliki as charged. CP 33-34. The court gave him concurrent sentences of nine months for the residential burglary and six months for possessing a stolen vehicle.

CP 82. The court added several financial obligations, including a \$1,200 "trial per diem" fee. CP 84. This appeal follows. CP 92-96.

D. ARGUMENT

1. **The State did not prove beyond a reasonable doubt that Mr. Motuliki was guilty of residential burglary**

The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22; Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The critical inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Brown, 162 Wn.2d 422, 428, 173 P.3d 245 (2007).

Mr. Motuliki was convicted of residential burglary. CP 33.

Washington's residential burglary statute reads in relevant part:

A person is guilty of residential burglary if, with the 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). Thus, the elements of residential burglary are than (1) Mr. Motuliki, (2) entered or remained in a dwelling, (3) with the intent to commit a crime against persons or property in the dwelling. Id; State v. Devitt, 152 Wn.App. 907, 911, 218 P.3d 647 (2009); CP 31. The State, however, did not prove these elements beyond a reasonable doubt.

First, the State did not prove beyond a reasonable doubt that the uninhabited building in question was a dwelling. "Dwelling" is defined as "any building or structure, though moveable or temporary, or a portion thereof, which is usually or ordinarily used by a person for lodging." RCW 9A.04.110(7). The owner of the house had died four months earlier, and there was no evidence that the house was occupied or contained items needed for residence. 1aRP 42-43; 1bRP 129.

Second, the State did not prove beyond a reasonable doubt that Mr. Motuliki entered the home. Deputy Kennison saw someone "real briefly" who appeared to exit the rear of the house, but he was 40 to 50 feet away. 1aRP 70-71. The officer chased the person as he jumped fences and ran through the neighborhood, but lost sight of him. 1aRP 72-73. Deputy Kennison explained it was difficult to estimate the height and weight of a person in that circumstance, and he only saw the person's face

for a moment. 1aRP 71, 102. In court, the officer could only say that Mr. Motuliki was “very similar” in appearance to the man he chased. 1aRP 102-03. Moreover, the presence of Mr. Motuliki’s fingerprints on the window of the residence is consistent with his testimony that he was at the house earlier in the day and looked in the window. The State did not prove beyond a reasonable doubt that Deputy Kennison observed was Mr., Motuliki and not George.

The State failed to prove two of the essential elements of residential burglary beyond a reasonable court – that the building was dwelling and that Mr. Motuliki was the person who entered the building. RCW 9A.52.025(1). Mr. Motuliki’s residential burglary conviction must be dismissed. Brown, 162 Wn.2d at 435.

**2. The State did not prove beyond a reasonable doubt that Mr. Motuliki was guilty of possessing a stolen motor vehicle**

The State also did not prove beyond a reasonable doubt that Mr. Motuliki possessed a stolen vehicle. The jury was instructed that the elements of the crime are that (1) the defendant knowingly possessed a stolen motor vehicle, (2) he knew that the vehicle was stolen, and (3) he withheld or appropriated the vehicle to the use of someone other than the true owner. RCW 9A.56.068(1); CP 35; see RCW 9A.56.140(1).

Possession may be established by actual physical possession or constructive possession. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969); State v. Cote, 123 Wn.App. 546, 549, 96 P.3d 410 (2004). Actual possession requires physical custody of the item. Cote, 123 Wn.App. at 549. The essential requirement for constructive possession is dominion and control over the item. State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002); Callahan, 77 Wn.2d at 29. Dominion and control “means that the object may be reduced to actual possession immediately.” Jones, 146 Wn.2d at 333. The appellate court must look at the “totality of the situation” to determine if there is sufficient evidence to establish a reasonable inference of dominion and control over contraband. Cote, 123 Wn.App. at 549 (quoting State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977)).

The State did not prove possession beyond a reasonable doubt in this case. No one testified that they saw Mr. Motuliki in possession of the pickup truck. The State’s circumstantial evidence also does not establish possession or control over the truck. Mr. Motuliki’s fingerprints were not found in the pickup. 1bRP 152. The State proved only that Mr. Motuliki’s cell phone was in the pocket of a jacket

in the pickup and that a note addressed to "Noah," Mr. Motuliki's nickname, were located in a bag inside the truck. 1aRP 89-93; 1bRP 202; 2RP 215, 217, 248.

Evidence that a defendant was the passenger in a stolen vehicle does not establish he possessed the vehicle. State v. Plank, 46 Wn.App. 728, 733, 731 P.2d 1170 (1987). Here, Mr. Motuliki's testified that George gave him a ride in the pickup truck, dropped him off, and left with Mr. Motuliki's cell phone. Evidence that Mr. Motuliki's cell phone was in the truck along with a paper that may or may not have been addressed to him do not prove Mr. Motuliki possessed the vehicle.

The State also failed to prove beyond a reasonable doubt that Mr. Motuliki knew the pickup truck was stolen. The car's owner testified that he had the only key, 1aRP 59-60, but no one testified that the truck's ignition was damaged or there was other evidence it had been stolen. Thus, there was no proof Mr. Motuliki was aware the vehicle was stolen.

The State did not prove beyond a reasonable doubt that Mr. Motuliki had actual or constructive possession over the stolen pickup truck or that he knew it was stolen. Mr. Motuliki's conviction for

possession of a stolen motor vehicle must be dismissed. Plank, 46

Wn.App. at 733.

**3. Mr. Motuliki did not receive the effective assistance of counsel guaranteed by the federal and state constitutions**

ER 609 permits a party to impeach a witness with prior convictions of dishonesty. When the prosecution impeaches a defendant with a criminal conviction, the defendant is entitled to an instruction informing the jury that the evidence is to be used only for purposes of determining the defendant's credibility. The prosecution impeached Mr. Motuliki with a conviction for theft, but defense counsel never proposed the standard limiting instruction. Where Mr. Motuliki was charged with theft-related offenses, his conviction must be reversed due to his counsel's deficient performance.

a. Mr. Motuliki was entitled to the effective assistance of counsel. A criminal defendant has the constitutional right to the assistance of counsel.<sup>1</sup> U.S. Const. amends. VI, XIV; Const. art. I, § 22;

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<sup>1</sup> The Sixth Amendment provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The Fourteenth Amendment states in part, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." The right to counsel found in the Sixth and Fourteenth Amendment applies to the States. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

Article I, Section 22 provides in part, "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . ."

State v. A.N.J., 168 Wn.2d 91, 96-97, 225 P.3d 956 (2010). Counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); United States v. Cronin, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Cronin, 488 U.S. at 655 (quoting Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975)). The right to counsel therefore necessarily includes the right to effective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); A.N.J., 168 Wn.2d at 98.

"A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in Strickland. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under Strickland, the appellate court must determine (1) whether the

attorney's performance below objective standards of reasonable representation, and, if so, (2) did counsel's deficient performance prejudice the defendant. Strickland, 466 U.S. at 687-88; Thomas, 109 Wn.2d at 226. Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. Strickland, 466 U.S. at 698; A.N.J., 168 Wn.2d at 109.

In reviewing the first prong of the Strickland test, the appellate courts presume that defense counsel was not deficient, but this presumption is rebutted if there is no possible tactical explanation for counsel's performance. Strickland, 466 U.S. at 689-90; State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The appellate court will find prejudice under the second prong if the defendant demonstrates "counsel's errors were so serious as to deprive the defendant of a fair trial." Strickland, 466 U.S. at 687.

b. Defense counsel's performance was defective because he did not address the theft conviction in Mr. Motuliki's direct testimony or offer the standard limiting instruction addressing ER 609 evidence. Mr. Motuliki was on trial for residential burglary and possession of a stolen motor vehicle. CP 1. Both crimes are related to theft. RCW 9A.56.068 (defendant must possess motor vehicle knowing it has

been stolen and withhold the property from its true owner); RCW 9A.52.025; RCW 9A.62.030 (to commit residential burglary or burglary in the second degree, defendant must enter or remain in dwelling or building with intent to commit a crime, the underlying crime is often theft, see e.g., State v. Johnson, 159 Wn.App. 766, 773, 247 P.3d 11 (2011); State v. Morris, 150 Wn.App. 927, 932-33, 210 P.3d 1025 (2009)).

Mr. Motuliki had a prior conviction for theft in the third degree. Ex. 26; CP 90. Theft is a crime of dishonesty which is admissible to impeach a witness. ER 609(a)(2); State v. Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991). It is a “long standing practice” for defense counsel to take the sting out of ER 609 evidence by addressing it in direct examination of their client. State v. Thang, 145 Wn.2d 630, 646, 41 P.3d 1159 (2002) (citing Irving Goldstein & Fred Lane, Goldstein Trial Technique § 11.30 at 29 (2<sup>nd</sup> ed. 1985); F. Lee Bailey & Henry B. Rothblatt, Successful Techniques for Criminal Trials § 253, at 222 (1981)).

The three main reasons for preemptive disclosure are: (1) the triers of fact are more likely to trust the side that discloses the information, (2) it avoids the appearance of hiding the information, and (3) the advocate can couch the information in sympathetic terms.

Id. (citing L. Timothy Perrin, Prickling Boils. Preserving Error: On the Horns of a Dilemma After *Ohler v. United States*, 34 U.C. Davis L.Rev. 615, 617 (2001)).

Mr. Motuliki's attorney, however, did not address the prior conviction in his direct examination of his client and does not appear to have prepared his client for cross-examination about his theft conviction. 2RP 221-36. Instead, when the prosecutor questioned Mr. Motuliki about the theft conviction, Mr. Motuliki denied the conviction and the prosecutor was able to admit a copy of his guilty plea and encourage the jury to view it during deliberations. 2RP 238-40, 296; Ex. 26.

When a defendant is impeached with a prior criminal conviction and the prior conviction is not admitted as substantive evidence, the jury should be instructed as to the proper use of the evidence. State v. Brown, 113 Wn.2d 520, 529, 782P.2d 1013, 787 P.2d 906 (1990); City of Seattle v. Patu, 108 Wn.App. 364, 376, 30 P.3d 522 (2001), affirmed on other grounds, 147 Wn.2d 717, 58 P.3d 273 (1984).

[W]here evidence of prior crimes is admitted under ER 609(a) for the purpose of impeaching a witness' credibility, an instruction should be given that the conviction is admissible only on the issue of the witness'

credibility, and, where the defendant is the witness impeached, may not be considered on the issue of guilt. Due to the potentially prejudicial nature of prior conviction evidence, these limiting instructions are of critical importance.

Brown, 113 Wn.2d at 529. The Washington Pattern Jury Instructions provide a specific limiting instruction for this purpose. WPIC 5.05 provides:

You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give the defendant's testimony, and for no other purpose.

11 Washington Practice: Washington Pattern Jury Instructions:

Criminal, WPIC 5.05, at 172 (2008) (WPIC).

Mr. Motuliki's counsel did not request the WPIC or ask that the jury be orally instructed as to the limitations on its use of the prior theft conviction. CP 10-11; 2RP 240. The instruction would have been given if requested, as the trial court must give WPIC 5.05 if requested. Brown, 113 Wn.2d at 529 (limiting instruction must be given if requested because of its critical importance); Patu, 108 Wn.App. at 476. The general instruction informing the jury that it is the sole judge of witness credibility does not provide this information. Patu, 108 Wn.App. at 476; CP 14.

Without this instruction, the jury was free to utilize Mr. Motuliki's prior theft conviction to reason that he had a bad character and was therefore more likely to have committed the current offenses or that he deserved to go to prison whether or not he was guilty. Patu, 108 Wn.App. at 377 (quoting State v. Newton, 109 Wn.2d 69, 73, 743 P.2d 254 (1987)). Moreover, defense counsel did not object when the prosecutor attempted to argue that Mr. Motuliki's theft conviction showed dishonesty, but told the jury they could consider "what kind of a person are we really looking at," thus suggesting the conviction could be used for propensity as well as credibility. 2RP 296.

There was no legitimate tactical reason not to address Mr. Motuliki's prior convictions on direct examination and limit the jury's consideration of the prior theft conviction by offering a limiting instruction. The constitution guarantees Mr. Motuliki the assistance of counsel "for his defence." U.S. Const. amend. VI; Cronic, 466 U.S. at 654. Defense counsel is required to employ "such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. This requires investigating both the law and the facts of the case. Id. at 690-91. Neglecting to do this research and therefore failing to propose relevant jury instructions constitutes

deficient performance. Kyllo, 166 Wn.2d at 868-69; Thomas, 109 Wn.2d at 229.

Additionally, even if Mr. Motuliki's counsel made a tactical decision not to address the theft conviction or offer a limiting instruction, it was not a reasonable tactical decision. Not all tactical decisions are immune from attack. State v. Grier, 171 Wn.2d 17, 33-34, 224 P.3d 1260 (2011); Reichenbach, 153 Wn.2d at 130 (no tactical reason not to bring meritorious suppression motion); State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999) (no tactical reason to propose jury instructions that could lead to conviction under a statute not in effect during charging period). "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

There are certainly times when a lawyer may decide an objection would draw the jury's attention to prejudicial evidence that is mentioned indirectly or in a fleeting comment. This type of decision, however, is not reasonable if the evidence in question is a prior theft conviction in a case where the State alleged the defendant broke into a home in order to commit theft and was also in possession

of stolen property. Without the limiting instruction, the jury was free to consider Mr. Motuliki's prior theft for any reason, including his propensity to commit the charged offenses or his bad character.

The Thomas Court reasoned that "a reasonably competent attorney would have been sufficiently aware of the relevant legal principles to enable him or her to propose an instruction based on pertinent cases." Thomas, 109 Wn.2d. at 229. Here, too, a reasonably competent attorney would have been sufficiently aware of his client's prior convictions to determine if there are crimes that could be pursuant to ER 609, bring those convictions out on direct examination, and propose a limiting instruction, readily available in the Washington Pattern Instructions.

c. Mr. Motuliki's convictions must be reversed. Mr. Motuliki's counsel was not prepared for the introduction of this theft conviction and did not ask the court to limit the jury's consideration of the conviction to impeachment. As a result of counsel's deficient performance, the jury was free to use Mr. Motuliki's theft conviction for evidence of his propensity to commit other property crimes or proof of his bad character. This Court must reverse his conviction and remand for a new trial. Thomas, 109 Wn.2d at 232.

**4. The sentencing court lacked statutory authority to order Mr. Motuliki to pay a \$1,200 “trial per diem fee” in addition to a \$550 court costs**

The sentencing court ordered Mr. Motuliki to pay a total of \$3,750 in legal financial obligations, which did not include restitution or additional defense fees that may be added in the future. CP 84-85. The Judgment and Sentence shows that the court did not find that Mr. Motuliki had the financial ability to pay the financial obligations. CP 82 (Finding of Fact 2.5 not checked); 2RP 345 (court finds Mr. Motuliki indigent for purposes of appeal). The court erred by including a \$1,200 “jury per diem” fee in Mr. Motuliki’s financial obligations

The superior court’s power to sentence a felony offender derives from the SRA. RCW 9.94A.505(1); In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007) (court has sentencing authority only as provided by Legislature). The defendant may challenge a sentence that does not comply with the SRA for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999). RCW 9.94A.505 provides that the court “shall” impose a sentence “as provided in the following sections and as applicable to the case.” RCW 9.94A.505(2)(a).

RCW 9.94A.760(1) permits the court to order court costs and other assessments “required by law.” RCW 10.01.160 permits the imposition of court costs on a convicted defendant only if “the defendant is or will be able to pay them.” RCW 10.01.160(1). RCW 10.01.160(2) specifically limits costs to expenses actually incurred in prosecuting the defendant and not costs inherent in providing a jury trial. See U.S. Const. amends. VI; XIV; Const. art. I §§ 21, 22.

Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision. They cannot include expenses inherent in providing a constitutionally-guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of the law.

RCW 10.01.160(2) (emphasis added). The court may, however, order the defendant to pay a jury trial fee, which cannot exceed \$250 for a 12-person jury. Id; RCW 10.46.190; RCW 36.18.016(3)(b); State v. Bunch, \_\_ Wn.App. \_\_, 2012 WL 1999648 at ¶ 5 (No. 41585-2-II, 6/5/12).

The trial court, however, ordered Mr. Motuliki to pay both a \$250 jury fee and a “trial per diem” fee of \$1,200 for a two-day trial. CP 84. The Judgment and Sentence provides no statutory authority

for the “trial per diem” fee. CP 84. The State did not provide the basis for this financial obligation and they were not discussed at sentencing.<sup>2</sup> 2RP 341-44.

There is no apparent statutory authority for the \$1,200 “trial per diem” fee imposed by the sentencing court. Moreover, a “trial per diem” fee in addition to the statutory jury fee appears to be for the costs of Mr. Motuliki’s constitutionally-guaranteed trial. Mr. Motuliki’s case must be remanded for the court to strike this fee. Bunch, 2012 WL 1999648 at ¶ 6; see, State v. Marintorres, 93 Wn.App. 442, 452, 969 P.2d 501 (1999) (vacating assessment of interpreter costs as violation of defendant’s right to equal protection).

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<sup>2</sup> There are no presentence reports in the superior court file.

E. CONCLUSION

Mr. Motuliki's convictions for residential burglary and possessing a stolen motor vehicle must be dismissed because the State did not prove the elements of each crime beyond a reasonable doubt. In the alternative, the convictions must be reversed and remanded for a new trial because Mr. Motuliki's constitutional right to effective assistance of counsel was violated. In addition, the trial court lacked statutory authority to order a \$1,200 trial fee.

DATED this 29<sup>th</sup> day of June 2012.

Respectfully submitted,



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Washington Appellate Project  
Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 42924-1-II
	)	
MANOA MOTULIKI,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29<sup>TH</sup> DAY OF JUNE, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> ANNE MOWRY CRUSER CLARK COUNTY PROSECUTOR'S OFFICE PO BOX 5000 VANCOUVER, WA 98666-5000	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA COA PORTAL prosecutor@clark.wa.gov Anne.Cruser@clark.wa.gov
<input checked="" type="checkbox"/> MANOA MOTULIKI DOC #201526 NORTHWEST DETENTION CENTER 1623 E J ST SUITE 5 TACOMA, WA 98421	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 29<sup>TH</sup> DAY OF JUNE, 2012.

X \_\_\_\_\_  


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