

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

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

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

The essential elements of residential burglary are that the defendant enter or remain in a dwelling with the intent to commit a crime against persons or property inside. RCW 9A.52.025(1); State v. Devitt, 152 Wn. App. 907, 911, 218 P.3d 647 (2009); CP 31. Mr. Motuliki's residential burglary conviction must be reversed and dismissed because the State did not prove beyond a reasonable doubt that (1) the building in question was a dwelling or (2) that Mr. Motuliki entered the building. Brief of Appellant at 7-9 (hereafter BOA).

A "dwelling" is defined by statute as a building or structure "ordinarily used by a person for lodging." RCW 9A.04.110(7). The building in Mr. Motuliki's case, however, was unoccupied and there was no evidence it was habitable. The State argues the house "was still furnished" and the deceased owner's sister was preparing for a garage sale. Brief of Respondent at 6 (citing 1bRP 132-33) (hereafter BOR). The record does not support the State's assertion. The sister, Betty Janulewicz, testified that there were things in boxes inside the house and "some furniture" in the front room because "we were going

to get out.” 1bRP 132. Ms. Janulewicz’s testimony did not establish that the house was furnished and habitable, as argued by the State.

The State also claims this Court should not consider Mr. Motuliki’s sufficiency argument because he did provide argument and citation to legal authority. BOR at 7. Mr. Motuliki referred this Court to the necessary legal authority – the residential burglary statute, the statutory definition of “dwelling,” and the facts contained in the verbatim report of proceedings. BOA at 7-8. Mr. Motuliki is not required to provide an appellate opinion exactly on point, as this Court is capable of reasoning from the statutes and facts.<sup>1</sup> The statutes and facts, for example, were the only authority this Court needed to decide that a defendant charged with residential burglary was entitled to instructions on the lesser-included offense of second degree burglary due to disputed evidence as to whether the building in question was a dwelling. State v. McDonald, 123 Wn. App. 85, 90, 96 P.3d 478 (2004). This Court must reject the State’s argument to the contrary.

Concerning Mr. Motuliki’s argument that the State did not prove beyond a reasonable doubt that he entered the residence, the prosecutor responds that Mr. Motuliki’s fingerprint was found on a

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<sup>1</sup> This was exactly what the jury was required to do. CP 21 (Instruction 1)

window pane removed from the house and that Deputy Andrew Kennison saw Mr. Motuliki "come out of the back of the house." BOR at 7. This evidence, however, does not provide the needed proof. Deputy Kennison testified that, from 40 to 50 yards away, he saw someone exit the back of the house "real briefly" at dusk. 1aRP 70-71. The deputy also testified that Mr. Motuliki was "very similar" to the man he saw, but he could not be completely sure. 1aRP 102-03. And, while Mr. Motuliki's fingerprint was found on the window pane taken out of the house, it was on the outside and not the inside of the window pane. 1bRP 155.

The State has the high burden of proving every element of a crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 315-16, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Even viewing the evidence in the light most favorable to the prosecution, the State did not prove beyond a reasonable doubt that Mr. Motuliki entered a dwelling with the intent to commit a crime against persons or property therein. His conviction must be reversed and dismissed. Devitt, 152 Wn. App. at 912.

**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 knowingly possessed a stolen vehicle, as it did not prove he possessed the pickup truck in question or knew it was stolen. RCW 9A.56.068(1); State v. Plank, 46 Wn. App. 728, 731, 731 P.2d 1170 (1987).

The State argues that it proved possession because a witness saw the person who burglarized the house driving the truck. BOR at 9. The witness in question, Walter Raschke, testified that he saw a man driving and the white pickup truck, and the man later went into the yard of the burglarized house and out of Mr. Raschke's sight. 1aRP 44, 47. Mr. Raskchke did not identify Mr. Motuliki as the person who he saw driving the pickup. 1aRP 40-53. He did not even say Mr. Motuliki looked "similar" to the person, as did Officer Kennison. 1aRP 40-53, 102-03. Thus, the State proved only that items that appeared to belong to Mr. Motuliki were found in the truck, not that he was in possession of the pickup.

The State also argues it established that Mr. Motuliki knew the pickup truck was stolen because his property was in the truck, the

owner said the truck had been "trashed and damaged," and Mr. Motuliki was committing a burglary. BOR at 9. This argument is unpersuasive. The only item inside the truck that was identified as Mr. Motuliki's was a cell phone, and its presence in the truck does not prove Mr. Motuliki knew the pickup was stolen. 2RP 214-15, 217, 249. The fact that the pickup was not in the same condition it was when the owner lost it does not establish that it was obviously stolen; not every truck on the road is in pristine condition. 1aRP 60-61, 62. And, the prosecutor's claim that Mr. Motuliki must have known the truck was stolen because he "was in the process of committing a burglary" is both illogical and an inflammatory appeal to consider propensity evidence. BOR at 9; see State v. Fuller, 169 Wn. App. 797, 828-31, 282 P.3d 126 (2012) (evidence defendant planned a robbery improperly admitted propensity evidence in prosecution for murder and felony murder based upon robbery).

Looking at the evidence in the light most favorable to the State, the evidence does not establish beyond a reasonable doubt that Mr. Motuliki was in knowing possession of a stolen motor vehicle. His conviction must be reversed and 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**

The Sixth Amendment guarantees the right to effective assistance of counsel. United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Mr. Motuliki had a prior conviction for theft, and when he denied the conviction on cross-examination, the State successfully admitted a certified copy of the Judgment and Sentence, guilty plea statement, information and citation as evidence pursuant to ER 609(a)(2). 2RF 238-40, 296; Ex. 26. Mr. Motuliki's attorney did not provide effective assistance of counsel because he failed to examine Mr. Motuliki about the prior conviction on direct examination and, once Exhibit 26 was admitted on cross-examination, he failed to offer an instruction informing the jury that the prior conviction could only be used in determining his credibility. BOA at 12-20 (citing inter alia State v. Brown, 113 Wn.2d 520, 529, 782 P.2d 1013, 787 P.2d 906 (1990); City of Seattle v. Patu, 108 Wn. App. 364, 376-77, 30 P.3d 522 (2001), affirmed on other grounds, 147 Wn.2d 717, 58 P.3d 273 (2002)).

The State first responds by misinterpreting Mr. Motuliki's argument. Mr. Motuliki does not argue that defense counsel was

"compelled" to ask his client about his prior theft conviction on direct examination. Compare BOR at 12-13 with AOB 15-16 (pointing out the tactical reasons for this practice, quoting State v. Thang, 145 Wn.2d 630, 646, 41 P.3d 1159 (2002)). Appellate courts review a claim of ineffective assistance of counsel based upon the facts of the individual case. Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Mr. Motuliki argues counsel's failure to do so was deficient performance based upon the facts of his case, not that limiting instruction must always be requested.

The State also claims that Mr. Motuliki did not deny the prior conviction, but simply appeared "confused." BOR at 16. A review of the transcript, however, shows that Mr. Motuliki said he had not been convicted of theft and he had never seen the court records, Exhibit 26, before. 2RP 238-39. He later said he remembered going to court but did not remember even being convicted of theft. 2RP 240. He thus denied the prior conviction.

The State then posits reasons why defense counsel's failure to address the conviction on direct examination was reasonable. The State theorizes, without citation to authority, that a reasonable attorney would have gambled that the prosecutor would chose not to

question Mr. Motuliki about the conviction or even forget to do so. BOR at 14. The State even claims that a prosecutor would chose not impeach a defendant with a theft conviction because the evidence might be challenged on appeal. This argument is specious, however, because theft is a crime of dishonesty that may always be used for impeachment under ER 609(a)(2). State v. Ray, 116 Wn.2d 531, 545, 806 P.2d 1220 (1991) (theft is crime of dishonesty that is per se admissible for impeachment). Moreover, prosecutors know that juries are often swayed by evidence that the defendant has a prior criminal conviction. See State v. Newton, 109 Wn.2d 69, 74-75, 743 P.2d 254 (1987) (noting studies showing jurors more likely to convict when they know the defendant has a prior record and stating prosecutors are aware of the “utility of such evidence in obtaining convictions”). Competent counsel thus would ask if the State intended to use any convictions to impeach the defendant under ER 609 in his motions in limine, thus eliminating any surprise. See CP 8; 1aRP 9-10, 14 (addressing defendant’s motion in limine concerning possible ER 404(b) evidence).

Once the State cross-examined Mr. Motuliki about the prior theft conviction, it admitted certified copies of the “shoplifting”

citation, the information alleging theft from Goodwill, Mr. Motuliki's guilty plea statement, and the Judgment and Sentence showing he received a one-year suspended sentence and two years of probation. Ex. 26. The jury thus had the opportunity to fully examine it during deliberations. Ex. 26; 2RP 301. In this circumstance, there is no reason to believe that the jury would forget the evidence. Competent counsel would have requested a limiting instruction, informing the jury of the limited purpose for which it could use the impeachment evidence, and objected when the prosecutor argued the theft conviction showed "what kind of a person" Mr. Motuliki was. 2RP 296; 11 Washington Practice: Washington Pattern Jury Instructions: Criminal WPIC 5.05, at 172 (2008); Brown, 113 Wn.2d at 529 (limiting instructions of "critical importance").

Once again, the State claims that Mr. Motuliki argues his attorney was "required" to request the instruction and argues his counsel was ineffective "as a matter of law." BOR at 16, 17. Instead, he simply argues that competent counsel would have requested a limiting instruction in this case.

The State also criticizes Mr. Motuliki for referring this Court to Brown, supra, for the proposition that the trial court must give an ER

609 limiting instruction when it is requested by the defense. BOR at 18. The State is correct that Brown addresses evidence admitted under both ER 609 and ER 404(b). However, Brown states that a limiting instruction "should be given" when prior offenses are admitted under ER 609 only for the purpose of credibility. Brown, 113 Wn.2d at 529. Other authorities cited by Mr. Motuliki and the prosecutor also amply support the rule that the trial court must give a limiting instruction when defense counsel requests one. State v. Dow, 162 Wn. App. 324, 333, 253 P.3d 476 (2011); Patu, 108 Wn. App. 376-77.

In reviewing a claim of ineffective assistance of counsel, the appellate courts presume that defense counsel's decisions were based upon a legitimate trial strategy. Strickland, 466 U.S. at 689. But defense counsel's strategic choices must be reasonable ones. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). In this case Mr. Motuliki was on trial for burglary and possession stolen property, and his defense rested on the jury believing his testimony. There was thus no reasonable tactical reason not to admit the prior conviction on direct examination. In addition, Mr. Motuliki denied that he had a prior theft conviction on cross-

examination, and the State thus admitted a copy of the Judgment as well as his guilty plea and the charging documents.

In this circumstance, there was no legitimate tactical reason for defense counsel not to offer a jury instruction such as WPIC 5.05 limiting the jury's consideration of the theft conviction to credibility. Without that instruction, the jury was free to conclude the prior theft meant that Mr. Motuliki was a thief who deserved to be punished. This Court must conclude that defense counsel's performance was deficient.

In light of the lack of a positive identification of Mr. Motuliki and the circumstantial nature of the case, defense counsel's deficient performance prejudiced Mr. Motuliki. His convictions must be reversed and remanded for a new trial.

**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**

Mr. Motuliki argues the trial court lacked statutory authority to order him to pay a \$1,200 "jury per diem" fee as part of his sentence. BOA at 21-23. The State responds that the \$1,200 was proper because it was part of the recoupment for Mr. Motuliki's court-appointed counsel. BOR at 20-25.

The State's argument is based only upon the placement of the \$1,200 figure in the Judgment and Sentence under the letters "PUB." BOR 20; CP 84. The State further claims that Mr. Motuliki's attorney "has been a contracted court-appointed defense in Clark County for well over a decade." *Id.* The State, however, provided no authority for this factual statement. This Court should ignore the State's reference to facts not in the record. RAP 10.3(a)(6), (b) (requiring references to the record in response brief); Litho Color, Inc. v. Pacific Employers Ins. Co., 98 Wn. App. 286, 305-06, 991 P.2d 638 (1999) (rules of appellate procedure designed to facilitate fair and efficient review of the record).

The State also argues Mr. Motuliki waived the right to appeal the imposition of the "trial per diem fee" by not objecting at the sentencing hearing. BOR at 21-24. This Court should reject the State's argument, as Washington permits appeals from improper sentencing orders.

Appellate courts normally address issues that were raised in the trial courts, but have the discretion to address other issues as well. RAP 2.5(a); State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). In Washington, erroneous or illegal sentences may always be

addressed for the first time on appeal. Ford, 137 Wn.2d at 477-78, 484-85 (criminal history); State v. Mendoza, 165 Wn.2d 913, 919-20, 205 P.3d 113 (2009) (criminal history); State v. Hunter, 102 Wn. App. 630, 633-64, 9 P.3d 872 (2000) (drug fund contribution), rev. denied, 142 Wn.2d 1026 (2001); State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369 (State's appeal of sentence below standard range), rev. denied, 122 Wn.2d 1024 (1993) (and cases cited therein).

Sentencing is a critical stage in a criminal proceeding. Permitting defendants to challenge an illegal sentence on appeal helps ensure that sentences are in compliance with the sentencing statutes. Mendoza, 165 Wn.2d at 920. Moreover, the rule inspires confidence in the criminal justice system and is consistent with the Sentencing Reform Act's goal of uniform and proportional sentencing. Id; Ford, 137 Wn.2d at 478-79, 484; RCW 9.94A.010(1)-(3). Mr. Motuliki is not required to show that the sentencing error meets the RAP 2.5(a) requirement of manifest constitutional error.

Finally, the State responds that the trial court was not required to make a specific factual finding that Mr. Motuliki was financially capable of paying the ordered legal financial obligations. BOR at 22-24. Mr. Motuliki did not assign error to the court's failure to make a

finding concerning his ability to pay. This issue is not before this Court.

B. CONCLUSION

For the reasons stated above and in the Brief of Appellant, Mr. Motuliki asks this Court to reverse and dismiss his convictions for residential burglary and possessing a stolen motor vehicle 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 9<sup>th</sup> day of November 2012.

Respectfully submitted,



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

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

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# WASHINGTON APPELLATE PROJECT

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